REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

DEFERRED CASES.—EASTERN DISTRICT.

NEW-ORLEANS, JUNE, 1834.

DEPASSAU *vs.* WINTER ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a possessory action the parties are precluded from going into an inquiry of titles; and the defendant will not even be permitted to show that the disputed premises is a public place or port, destined to public use.

When the evidence shows that the *locus in quo* does not cover the high road, a street, levee or tow-path, and is consequently subject to private ownership, whether the plaintiff be the real owner or not; or whether the premises in dispute be public or appropriated absolutely to public uses? are questions not permitted by law in possessory actions.

The plaintiff instituted his possessory action against the defendants on the 15th July, 1833, and alleges that he has been in the peaceable possession of a lot of ground situated in the Nuns faubourg, now within the limits of the city of Lafayette, lying between the public road and the river Mississippi, and in the actual occupation and possession of

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his tenants. That on that day Joshua Winter, under pretence of authority from the president and board of council of the city of Lafayette, forcibly and illegally entered upon and took possession of said lot, and drove off his tenants. He prays that Winter be condemned to restore possession of the disputed premises, pay him three hundred and fifty dollars in damages, and that he be enjoined from acting any further in the premises.

An injunction was granted as prayed for. On the 29th July the plaintiff filed his supplemental petition, alleging that Winter, styling himself harbor-master, has, since the granting of the injunction, ordered his tenants to remove from the ground in question, and threatens force in case of refusal. He prays that Winter and the president and council of the city of Lafayette be restrained and ordered to desist from all manner of disturbance, except as relates to so much ground as is required for banquettes or a levee, and subject to public use.

The president and city council of Lafayette answered and averred that the public street or road in front of the plaintiff's lot, according to the original plan established by the nuns, is sixty feet, French measure, in width, and that the levee extends in width from the street to the river, and that the possession and use of said street and levee has always been in the public; which, by the act of incorporation, is given in charge to the president and council of the city of Lafayette, for the use of the public.

The defendants allege, they have been obstructed and forcibly opposed by the plaintiff and his tenants in re-establishing the lines of said street and levee, in making banquettes and gutters; and that the plaintiff and his agents have constantly, for three months past, incumbered the street and levee and bank of the river with wood and lumber, so as to obstruct and prevent the landing and shipment of articles of commerce in front of said property. They pray judgment in re-convention for damages, and that the plaintiff be perpetually enjoined from interfering or opposing their possession and use of the disputed premises.

Winter pleaded a general denial, and denied specially having trespassed on the plaintiff's property; and declared that he was duly appointed harbor-master of the city of Lafayette, in which capacity he done the acts complained of, &c.

The evidence for plaintiff established, that he had for several years past, say ten or twelve years, leased out the ground in question to various tenants; that the tenants possessed and occupied from the street to the margin of the river bank; that plaintiff maintained and repaired the street and levee. The ground, of which plaintiff claimed to be in possession, was not in any manner inclosed, but used as a lumber-yard.

Turner testifies, that there is a space of one hundred and twenty-eight feet from the north or swamp side of Tchoupitoulas-street to the water's edge at high water, and according to his calculation and views, deducting forty feet for landing and sixty-four feet for street, there would be a space of twenty-four feet in width and about two hundred in length, which will remain to plaintiff.

According to the testimony of the surveyors, Pilié and Buisson, in connection with the plan on which the Nuns faubourg was laid out, the "*highway*," now a continuation of Tchoupitoulas-street, is laid down so as to join with the levee, and the admeasurements taken on the scale of that plan would leave for levee and landing all the ground between the street and high water-mark. The inference would be that the ground, of which plaintiff alleges himself to be in possession, would be ground dedicated to public purposes so far as the use is concerned; the plaintiff would be entitled to the right of property according to a deed of a front lot, which was also offered in evidence, by which it appears they were expressly constituted proprietors of the river. The introduction of this plan and deed were opposed by plaintiff, on the ground that he had brought a possessory action, and that the only points of inquiry were his possession, and if that possession had been disturbed.

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The court admitted the evidence on general principles of law, and the authority in the case of *Allard et als.* vs. *Lobau.* 3 *Martin, N. S.* 293.

The district judge was also of opinion that the plea of the plaintiff, based on one year's prescriptive peaceable possession, could not be sustained against the *right of use of a public place.* The possessory action is only admissible when the possession is of a nature to acquire by prescription the right in which the plaintiff seeks to be maintained. *Paillet on art.* 23 *of Code of Procedure.*

On the merits the court was with the defendants. It appears, says the court, that there cannot be any of the common and usual modes of employing the ground between the high-way and the water's edge in a country like Louisiana, for such employment of it would deprive the public of a use to which they are entitled. If such ground were to be inclosed and used for pasture, &c., there could not be such ready means of embarkation and debarkation, as if no such obstructions existed, nor so convenient a tow-path. The banks of rivers in other countries usually present such obstacles from rocks and other obstructions, and the road must usually be carried along them at such a distance from the river, that there is a necessity for special landing places and the banks elsewhere may be inclosed. On the Mississippi it is equally convenient to embark at one place or another; it is one continued plain; its banks are a village, and the river itself a canal. If these observations have any weight with regard to the country, their force is much greater applied to a city and its faubourgs; and but for the rare exception of the case lately decided as to New-Orleans, I should be disposed to lay it down as a universal rule, that there cannot exist any such private use of ground between the highway and the water as will interfere with the public use and rights over such ground. I concur with the surveyors in their opinion derived from the plan, and this view of the matter is fortified by a personal inspection of the premises in presence of the parties referred to, that there is no land between the highway or Tchoupi-

toulas street continued, and the water's edge susceptible of being applied to the ordinary uses of private property; that the use of the ground in question is in the public, and that the acts of the plaintiff in claiming and exercising ownership and the uses he has put it to, are not warranted by any rights of property in him over the premises in question.

There was judgment dissolving the plaintiff's injunction, and putting the city council of Lafayette in charge and possession of the street, levee and banks of the river in front of plaintiff's property, and ordering him to remove all obstructions and the incumbrances he had placed on the disputed premises. He appealed.

This case was argued by Mr. *Strawbridge*, for the plaintiff, and by Mr. *Preston*, for the defendants.

Mathews, J. delivered the opinion of the court.

This is a possessory action, in which the plaintiff alleges that he is, and has been for more than one year previous to the commencement of the present suit, in peaceable possession of a lot of ground, situated in the Nuns faubourg, formerly so called, now the city of Lafayette, &c.; and that he has been disturbed in his possession by acts of the defendants. He prays that they may be enjoined from further disturbance and for damages. Judgment was rendered in the court below for the defendants, from which the plaintiff appealed.

The disturbance took place by directions of the constituted authorities of the city of Lafayette, who claim the use of the land in dispute for public purposes. It is a slip of about twenty-five feet wide and two hundred and fifty long, and is shown by the evidence to be between the highway or street in front of the city aforesaid, and the levee, and directly in front of plaintiff's lot, &c. The record affords proof that he had been in peaceable possession of these premises, for the space of ten or twelve years previous to the disturbance now complained of.

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When the evidence shows that the *locus in quo* does not cover the high road, a street, levee or tow-path, and is consequently subject to private ownership; whether the plaintiff be the real owner or not; or whether the premises in dispute be public or appropriated absolutely to public uses? are questions not permitted by law in possessory actions.

The court below went into a long investigation of titles under which the respective parties claim both in relation to property and right of use on the part of the defendants, and finally concluded that the lot in dispute was destined for public use, and could not be legally possessed by any individual of the community. We are of opinion that there is error in the proceedings below, by going into an inquiry of titles in the present action: it is simply possessory. The testimony shows, that the *locus in quo* is not a part of the high road or street; neither does it cover the levee or tow-path; consequently it may be the subject of private ownership, and whether the plaintiff be the real owner or not, whether the place in dispute be public or appropriated absolutely to the use of the public? These questions depend on an investigation of titles, which would cause a delay in the administration of justice not permitted by law in a possessory action. See the *Code of Practice, art.* 47 *to* 49, *and from* 53 *to* 58 *inclusive.*

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed: and it is further ordered, adjudged and decreed, that the plaintiff be quieted in his possession of the lot of ground in dispute; and that the defendants be enjoined from disturbing him in his possession by digging up the earth, planting posts, or in any other manner; reserving to them the right (if any they have) to bring a petitory action or to institute any other legal process for the purpose of establishing the rights by them claimed in favor of the city of Lafayette, or of the public in general. The defendants and appellees are condemned to pay costs in both courts.

PRESTON *vs.* DAYSSON ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

According to the act of the legislature, passed the 13th March, 1827, *concerning protests of bills and notes*, whenever the notary certifies, that, after diligent inquiry for the residence of the party intended to be *charged by notice*, he is unable to find it, and has lodged the notice in the nearest post-office, addressed to him at the place where the contract was made, it is deemed equivalent to personal notice.

Of the fact stated in the notary's certificate, that due diligence was used by him, to find the residence of the party, but in vain, and of the notice being deposited in the post-office, the certificate itself, must be taken as *primâ facie* evidence.

The nature and degree of the diligence used by the notary, to find the residence of the party, on whom notice is to be served, may be inquired into, and if in point of fact, he did not use *due diligence* to obtain the necessary information, then the presumption arising from his official certificate will yield to contrary proof.

The statute passed by the legislature, does not change the usage or rule of the commercial law, in relation to the diligence to be used, in serving notices of protest, but merely provides a new mode of proof of such diligence.

When the statute speaks of *due* diligence, without defining in what it shall consist, it refers necessarily to the existing rule, according to commercial law or usage.

If the holder of a bill uses reasonable diligence to discover the residence of the endorser, notice given as soon as this is discovered, is *due notice* of the dishonor of the bill, within the usage and custom of merchants.

The holder of a bill or note ought not to avail himself of the ignorance of the notary, as to the residence of the endorsers.

The plaintiff alleges that one Lasalle, on the 23d of July, 1832, executed his note for three hundred and thirty dollars ninety-four cents, payable four months after date, to the order of one Plotz, who endorsed it to Madame veuve Daysson, who endorsed it to the petitioner. That said note

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was presented for payment, protested, and due notice thereof given to the endorsers, who have all become liable for the payment thereof. He prays judgment accordingly.

Madame Daysson alone made a defence. She admitted her endorsement on the note, pleaded the general issue, and denied specially, having ever received notice of protest.

The note and protest were given in evidence. The protest bears date the 26th November, 1833, and the certificate of the notary, also in evidence, states that he notified the defendant (veuve Daysson) of the protest by *letter* addressed to her, dated on the day of said protest, and served on her this day, by depositing the same in the post-office in this city, directed to her, *not having been able to find her, after due and diligent inquiry.*

Parole evidence was given to rebut the presumption in the notary's certificate of due diligence being used, without effect, to find the defendant's residence. The notary did not make the inquiry himself. One of his clerks was sent with the notice. He swears he called at the store of the drawer and the payee and endorser of the note, but could not obtain information of the residence of Madame Daysson, to deliver the notice. On reporting this fact to the notary, he was directed to deposit the notice in the city post-office, directed to her, in pursuance of the *act of* 1827, *p.* 76.

D. Seghers, witness for defendant, says that Mr. Tricou, who negotiated the note, and whose name was endorsed on it, was well acquainted with Madame Daysson's residence, and could easily have pointed it out to the notary. It is in evidence that defendant's husband kept a store, and this note was taken by her in payment of goods sold at private sale of her husband's succession. The note fell due the 26th November, 1833; notice was due to her next day. She was verbally informed on the 30th November of the protest, and received the written notice on the 2d December.

The district judge was of opinion that due diligence was not used to obtain the necessary information of the defendant's residence, and gave judgment in her favor. The plaintiff appealed.

Preston, in propriâ personâ, and for appellee. We have shown that due diligence was used to ascertain the place of defendant's residence, but in vain; but being sued as endorser, she was duly notified of the dishonor of the note, through the post office. See *act of* 1827, 1 *Moreau, Digest, p.* 96.

2. Neither the plaintiff or defendant were merchants, and could suffer no damage by a delay of six days, in receiving notice of the dishonor of the note.

3. The defendant, in consequence of the death of her husband, had rented out the ground floor, and retired from business into the upper story of her house, where her residence was unknown. Her business was all in charge of an agent, and she not known (being a woman,) to any but her agent or lawyer.

4. Notice through the post-office should be liberally construed, in a large city where there is such a heterogeneous, and so dense a population as in New-Orleans, in which our next door neighbor is often a stranger to us; while the love and pleasure of literary correspondence, lead us constantly to the post-office for every kind of intelligence.

J. Seghers, contra, contended, that the notice in this case is insufficient. The sufficiency of notice sent by mail, is well established, when the person to be charged, resides in a different town or place, from that in which the note was presented for payment. But when he resides in the same place, notice must be personal, or left at his residence or place of business; depositing it in the post-office, is insufficient. *Bayley on Bills, ed.* 1826, *p.* 178, *note a.*

2. When the party resides in the place where payment is demanded, notice of the dishonor must be given to him, at farthest, on the day following that of protest or dishonor. To those who reside elsewhere, it must be sent by the post on that or the following post day. 11 *Martin*, 452. *Bayley on Bills*, 171.

3. When a party's residence is unknown, *due* diligence must in general, be used to find it out. Inquiry should be made of some of the *other parties to the note.* *Bayley*, 180, 181.

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4. In this case the notary did not use due diligence, nor did he make inquiry as he should have done.

5. The third section of the act of 1827, does not apply to parties residing in the same place where the demand and dishonor of the bill takes place. It provides that the notary shall use *all due* diligence to obtain the necessary information as to residence of the party to be notified, which, in this case, he has not done.

Bullard, J. delivered the opinion of the court.

This suit is brought by the holder of a promissory note, against the endorsers; and the plaintiff alleges a regular demand of the drawer, protest for non-payment, and due notice to the defendant as endorser. The defendant denies all the facts in the petition, except her signature, and she specially denies having received notice of protest.

In support of the allegation that the defendant had been duly notified of the demand, and non-payment, the plaintiff gave in evidence, a notarial protest, in the usual form, with a certificate of the notary public thereto annexed, stating the manner in which the notices had been given to the other parties to the note. After stating in what manner the other endorsers had been notified, the notary says, that the defendant was notified "by depositing the one (letter) for veuve Daysson in the post-office in this city, directed to her, not having been able to find her, after due and diligent inquiry."

The effect we are to give to this certificate, as evidence of notice, depends on the construction of the act of the legislature, of the 13th March, 1827, entitled "an act to amend an act concerning protests of bills of exchange, and promissory notes," &c.

The first section of this act, provides "that all notaries, or persons acting as such, are authorised in their protests of bills of exchange, promissory notes or orders, for the payment of money, to make mention of the demand made upon the d awer, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner or circum-

stances of such demand, and his certificate added to such protest, to state the manner in which such notices of protest, to drawers, endorsers, or other persons interested were served or forwarded, and whenever they shall have so done, a certified copy of such certificate and protest, shall be evidence of all the matters therein contained." The third section provides, that "whenever the residence of any such drawer, acceptor, endorser or others, shall be unknown to the notaries or others acting as such, and whenever, after using all due diligence to obtain the necessary information thereon, the said residence shall not have been found by said notaries or others, acting as such, then, and in that case, it shall be the duty of such notary or others acting as such, to put the notices of such protest in the nearest post-office, where such protest was made, addressed to such drawer, acceptor, endorsers or others, at the place where it shall appear by the face thereof, such bill of exchange or promissory note was drawn, and the same shall be deemed and considered as legal notice of such protest."

Whatever we may think of the policy of this act, as an innovation on commercial usages, we are bound to give effect to it, according to its true construction. We think the legislature intended to declare, that whenever the notary certified that after diligent inquiry for the residence of the party intended to be charged by notice, he could not find it, a notice had been lodged in the nearest post-office, addressed to him, at the place where the contract was made, it should be deemed equivalent to personal notice. Of the fact that such diligence was used, and such notice was deposited in the post-office, the certificate of the notary must be taken as *primâ facie* evidence. The nature and degree of that diligence may be inquired into, and if it should appear that in point of fact, the notary did not use due diligence to obtain the necessary information, then the presumption arising from his official certificate, will yield to the contrary proof. The question, therefore is, whether the evidence offered by the parties, shows a want of diligence on the part of the notary to find the residence of the endorser.

According to the act of the legislature passed the 13th March, 1827, *concerning protests of bills and notes*, whenever the notary certifies that after diligent inquiry for the residence of the party intended to be *charged by notice*, he is unable to find it, and has lodged the notice in the nearest post-office, addressed to him at the place where the contract was made, it is deemed equivalent to personal notice.

Of the fact stated in the notary's certificate, that due diligence was used by him to find the residence of the party but in vain, and of the notice being deposited in the post-office, the certificate itself must be taken as *primâ facie* evidence.

The nature and degree of the diligence used by the notary to find the residence of the party on whom notice is to be served, may be inquired into, and if in point of fact he did not use *due diligence* to obtain the necessary information

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then the presumption arising from his official certificate will yield to contrary proof.

The notary who was sworn as a witness, deposed, that he did not make the inquiries for the domicil of Madame Daysson himself, nor did he deposit the notice of protest in the post-office. That it was done by a clerk of his. That he is regular in sending all notices of protest to the post-office, when the persons to whom they are directed, cannot be found on the day after the protest is made.

The notary's clerk, F. B. Vinot, deposed, that he was employed to deliver the notices of protest to the different endorsers, and did so as stated in the certificate. That he made inquiry at the store of the drawer, and at that of the other endorsers, for the domicil of Madame Daysson, in order to deliver the notice of protest to her, but the persons in the house could not tell him where she lived. He reported this to Mr. Christy, who directed him to put the letter directed to Madame Daysson, into the post-office. On his cross examination, the witness stated, that he had no distinct recollection of putting this letter into the post-office, for Madame Daysson. Mr. Christy being re-examined, says, that he has a distinct recollection of giving the written notice of protest of the note sued on, along with others, to Vinot, in order to be put into the post-office.

On the other hand, S. Borel, the agent of the defendant, testified that the defendant resides in Royal-street, where she has lived for eighteen months; that she lived previously in Maine-street; that she does not now keep a store; her husband formerly kept a store, and died there; that she had hired out the room on the ground floor, and lives in the second story. He takes the defendant's letters out of the post-office for her; he took out the letter No. 1, on the 2d December; he had been at the office the day preceding inquiring for letters for the defendant, but there was none for her. He had no knowledge of her receiving any other notice, than that received on the 2d December.

The notice in the record, is dated November 26, 1833, and Vinot swears that it was put into the post-office on the same day. If that be true, it is of no importance at what period it reached defendant, provided due diligence had been used to

find out her residence, because the statute makes the putting of the letter into the office, constructive notice. The testimony of Borel is altogether negative; he inquired for letters on the 1st of December and there was none; but it does not appear, that he or any body else had inquired on the preceding days, from the 26th November, up to the 1st of December. This does not prove that the letter was not in the office. It may have been overlooked by the attendants, or not having been called for during the month of November, it may have been placed with letters to be advertised.

The defendant's counsel relies on the authority of *Bayley on Bills*, to show that when it is not known where a party lives, due diligence must in general be used, to find him out, and inquiry should be made of some of the other parties of the bill. *Bayley on Bills*, 180, 181.

It is shown in this case, that inquiry was made at the domicil of two other parties to this note, for the residence of the defendant, without effect. According to that authority, the diligence used was such as is considered sufficient by the commercial law. We are of opinion, that this statute has not introduced a new rule on this subject, but merely a new mode of proof of such diligence. We cannot assent to the proposition of the defendant's counsel, that the third section of the act referred to, does not apply to such parties as reside at the same place. The statute makes no exception, and indeed no such exception could have been contemplated, because the whole section rests on the hypothesis, that the residence of the party is unknown, and then the notice is directed to be given at the place where his obligation was contracted or rather where the bill was drawn. This note was drawn in New-Orleans, and that is presumed to be the residence of the parties.

The statute passed by the legislature does not change the usage or rule of the commercial law in relation to the diligence to be used in serving notices of protest, but merely provides a new mode of proof of such diligence.

When the statute speaks of due diligence, without defining in what that shall consist, it refers necessarily to the existing rule, according to commercial law or usage.

"The holder of a bill of exchange," says Chitty, "is excused for not giving regular notice of its being dishonored to an endorser, of whose place of residence he is ignorant, if he

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use reasonable diligence to discover where the endorsers may be found;" and Lord Ellenborough observed, "when the holder of a bill of exchange does not know where the endorser is to be found, it would be very hard if he lost his remedy, by not communicating immediate notice of the dishonor of the bill, and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance, but if he uses reasonable diligence to discover the residence of the endorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonor of the bill, within the usage and custom of merchants." *Chitty on Bills*, 276.

If the holder of a bill uses reasonable diligence to discover the residence of the endorser, notice given as soon as this is discovered, is *due notice* of the dishonor of the bill within the usage and custom of merchants.

According to our view of the law, and the evidence in the case, the endorser is not released from her liability. It is true, the holder of the paper ought not to avail himself of the ignorance of the notary, as to the residence of the endorsers, but there is no evidence to show that the holder knew where she resided.

The holder of a bill or note ought not to avail himself of the ignorance of the notary as to the residence of the endorsers.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the plaintiff recover of the defendant, three hundred and thirty dollars and ninety-four cents, with interest at five per cent., from the 26th of November, 1833, and costs in both courts.

MURPHY *vs.* BEZOUT.

APPEAL FROM THE PARISH COURT FOR THE PARISH OF IBERVILLE.

Where an appeal was taken from a parish in the Fourth Judicial District, to the Eastern District of the Supreme Court at New-Orleans, and made returnable on the first Monday in January, when there was time to have returned it to the November term preceding: on motion of the appellee, the appeal was dismissed as being irregularly taken.

An agreement of the appellee, endorsed on the record, that the cause be postponed to the next term for trial, does not amount to a waiver of his exception, to the irregularity of the appeal.

The plaintiff alleges, that at a public sale by the inspector of roads and levees, for the Ninth District, in the parish of Iberville, made on the 3d March, 1832, he became the lowest bidder of certain works and repairs ordered to be done, on the front of the defendant's plantation, at twenty-five dollars per arpent. That the whole distance was twenty-five arpents, which he has repaired according to contract, and amounts to the sum of six hundred and twenty-five dollars, which he has demanded of the defendant, and which she refuses to pay. He prays for an order of seizure and sale of the land of the defendant to pay his said claim.

The defendant pleaded a general denial; and that she resided out of the parish; that she had no notice of the order and adjudication of the repairs required, and that the work was not performed by the defendant according to law.

The plaintiff had judgment for the amount of his claim, and that the premises which were repaired, be seized and sold to satisfy the judgment.

The defendant prayed an appeal, *returnable on the next term of the Supreme Court.*

On the 10th September, 1832, the parish judge granted the appeal, on the appellant giving bond and security as the law required, *returnable in the Supreme Court, on the first Monday in January next.* The transcript was filed with the clerk of the Eastern District, at New-Orleans, on the 7th January, 1833.

Labauve, for the plaintiff and appellee, moved to dismiss the appeal on the following grounds:

1. The return day of the appeal was improperly fixed, and the appellee was therefore illegally cited in court. He should have been cited for the November or December term of the court, and not for January term.

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2. The judge who granted the appeal, failed or omitted to fix the amount for which the appeal bond was to have been given, as required by law.

Cuvillier, contra. The appellee cannot now move to have this appeal dismissed, after having appeared and agreed to have the cause fixed for trial, on the first Monday of March following the return of the appeal.

2. The agreement to try the cause at a future day, was a waiver of the exception to the return day of the appeal.

3. If an error was made in fixing the return day of the appeal, it is no fault of the appellants. We prayed in our petition, that the appeal be made *returnable on the first term of the court.*

Where an appeal was taken from a parish in the 4th Judicial District, to the Eastern District of the Supreme Court at New-Orleans and made returnable on the first Monday in January, when there was time to have returned it to the November term preceding: on motion of the appellee the appeal was dismissed as being irregularly taken.

4. The error (if any) was committed by the judge *a quo*, who made the appeal returnable on the first Monday in January, instead of the last Monday of November. He certifies and gives as a reason for so doing, that similar returns were made by the district judges for the parish of Iberville, at the suggestion of the members of the bar, in consequence of the Supreme Court having fixed the January and March terms for the hearing of appeals, from the Fourth Judicial District.

Bullard, J. delivered the opinion of the court.

The appellee moves to dismiss this appeal on the ground, that it was made returnable at the January term, whereas it should have been made returnable in November.

The order of the judge was given on the 10th of September, and the next term was that of November last.

An agreement of the appellee endorsed on the record that the cause be postponed to the next term for trial, does not amount to a waiver of his exception to the irregularity of the appeal.

But it is contended by the appellant, that this irregularity has been caused by an appearance in this court, and an agreement by the appellee, endorsed on the record, that the case be postponed till March term. The court is of opinion, that this does not amount to a waiver of his exception to the irregularity.

It is therefore ordered, that the appeal be dismissed at the costs of the appellant.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where colored persons have been treated with as *free*, in a certain transaction or compromise, their freedom and capacity to enter into such an engagement, cannot afterwards be questioned, by the other party, with a view of avoiding the contract, on the ground that they were slaves; much less for the purpose of depriving them of the common privilege of all parties to a contract, i. e. that of contesting its validity, on the score of error and fraud.

The executor is bound to administer on all the property of a succession which is expressly declared in the will by the testator to form a part of his estate; even on property claimed by an adverse title, unless inhibited by competent authority.

Persons claiming as legatees under a will, cannot set up title to property under an anterior sale and conveyance, which is expressly declared in the will to form a part of the estate of the testator.

A transaction entered into on the part of minors, duly represented, and made according to the forms of law, will cure defects in a judgment which was not conclusive, and against which the minor might otherwise be relieved.

Where the curator *ad bona* of a minor above the age of puberty, purchased property for the use and in the name of his ward, at the sale of his father and mother's estate, and during his minority in an action of partition he is charged with his share of the estate thus purchased and received, by a judgment of the Probate Court: In an action to set aside the purchase, as having been made without his concurrence and consent: *Held*, that he was precluded by the judgment of the Probate Court so long as it stood unreversed.

Where the price of minors' property has been received by their tutor, and placed to their credit on a tableau of distribution of the tutor's estate, which is homologated by a judgment of the Probate Court, and is unappealed from, the minors are precluded from setting up title to the property itself, so long as the judgment of homologation subsists, showing they have received the *price*.

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Transactions have, between the parties, the authority of the thing adjudged; and where the parties compromise generally on all differences, the titles which are unknown and afterwards discovered, are not cause for rescinding the transaction, unless they have been concealed purposely by one of the parties.

And where the renunciation of all claims and demands, in an act of compromise or transaction, is full and explicit, and no mention is made of a latent title to certain property included in the transaction, but no evidence showing that the title was concealed on purpose by the party, the transaction will not be rescinded.

Judgments rendered by courts of competent jurisdiction, against minors duly and legally represented, so long as they are not reversed or declared to be null, have the same force and validity as if the parties were of full age.

In an appeal where security is given merely and expressly for costs, the execution of the judgment below is not suspended thereby: it is not a suspensive, but merely a devolutive appeal.

An injunction bond given at the inception of the suit, cannot be cumulated with the appeal bond given in the same suit on appeal.

The present suit commenced by injunction. The record shows, that on the 7th January, 1833, the executors of Antoine Abat obtained an order of seizure and sale against the present plaintiffs, who are the acknowledged natural children and heirs of Jean Grounx, deceased, for the sale of a house and lot of ground, on the corner of Rampart-street and the Bayou road, in virtue of a certain deed of compromise or transaction, entered into the 3d October, 1832, between the said heirs, represented by their tutor and co-heir, Jean Baptiste Grounx, f. m. c., and the executors of Antoine Abat; which said house and lot of ground was confirmed to the heirs of Grounx for the price of four thousand nine hundred dollars, and mortgage retained, with the express provision that if the price was not paid on the 31st of December following, the property should be seized and sold.

On the 17th day of January, 1833, the present plaintiffs, by their under-tutor, J. Monrose, f. m. c., filed their petition and opposition to the order of seizure and sale, in which they

allege that since the execution of the transaction or compromise of the 3d October, 1832, they have learned that the house and lot of ground in contest was originally their property, and belonged to them at that time, in virtue of an act of sale passed the 21st January, 1818, by their natural father, in which he conveyed said property to their natural mother, and in trust for their use and benefit, in consideration of the sum and for the price of five thousand dollars. They further allege that, being ignorant of said sale and title to said property, their tutor and representative in said transaction was induced to accede thereto through error, and bind them for the price of four thousand nine hundred dollars as a new purchase of said property. They specially charge that this title was withheld, and not set forth and made known by the executors of Abat, who had charge of their natural father and mother's business at the time of signing the said transaction; and that the same was executed on the part of these plaintiffs through error, on the one hand, and obtained by unlawful means on the other.

1. They pray that they may be declared to be the true and lawful owners of the property in contest, in virtue of the act of sale dated the 21st January, 1818.

2. That the said transaction or compromise be declared null and void as regards the engagement requiring them to pay to Abat's executor four thousand nine hundred dollars, as the price of said property.

3. That their tutor and co-heir who signed the transaction, be prohibited from paying said sum of four thousand nine hundred dollars.

4. That under the articles 303 and 739, No. 6, of the Code of Practice, relative to acts obtained by unlawful means, they pray for an injunction to stay all proceedings under the order of seizure and sale.

5. That under the articles 739 and 740 of the Code of Practice, they pray that their under-tutor, by whom they institute this suit, be dispensed with giving security; and that Jean B. Grounx, f. m. c., their tutor, and the executors of Abat, be cited to answer their petition; that the transaction

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of the 3d of October, 1832, be annulled, and that in the mean time all proceedings under the order of seizure and sale be enjoined.

Abat's executors excepted to the form of the plaintiffs' opposition to their order of seizure and sale, as being contrary to the article 738 of the Code of Practice. They deny generally the allegations of the plaintiffs, except the execution of the transaction or act of compromise; and deny specially that it was made or obtained either in error or by unlawful means, which charge is slanderous, and should be struck out. They allege, that at the time of the compromise or transaction, the pretended deed of sale of the 21st January, 1818, was well known to all parties to be a nullity, and was not, therefore, deemed necessary to be noticed or mentioned; that it was null and void, for the following reasons:

1. As a sale, it was without consideration and a disguised donation.

2. As a donation, it contained conditions contrary to good morals.

3. It was not recorded with the recorder of mortgages.

4. As a donation, it exceeded the disposable portion.

5. The donor subsequently declared in his will that the said sale was intended as a mere donation.

6. The parties to said act of sale, viz: the natural father and mother of the plaintiffs, have by a subsequent act, dated the 24th February, 1821, acknowledged and declared that said sale was feigned and simulated, and that it is hereby annulled and avoided.

7. Because the property claimed by the plaintiffs as minors in virtue of said sale, was inventoried and sold by order of the Court of Probates, as a part of the succession of Jean Grounx, deceased, their natural father.

8. Because in the settlement of said succession, the plaintiffs received their full share of the *price* of the very property they now seek to recover under the said pretended sale.

9. Because at the time of executing the act of sale of the 21st January, 1818, the plaintiffs were slaves, and incapable of acquiring property by purchase or donation.

J. B. Grounx, tutor of the plaintiffs, appearing adversely, answered and prayed, that the deed of transaction be declared good and maintained in full force between the contracting parties; and that the executors of Abat make good the title to the property in contest, in pursuance of the obligation contracted in said transaction.

He further prayed, that in case said property should be decreed to belong to said minors in virtue of the sale of the 21st January, 1818, that Abat's executors be ordered to pay the value thereof to him; and that he be dispensed from paying the price as agreed on in said transaction.

The two causes, viz: the case of the order of seizure and sale by Abat's executors, against the present plaintiffs, was consolidated with the present suit, and both tried together.

The plaintiffs were ordered to give security in the sum of two thousand dollars, before they could proceed with the injunction suit.

Upon these pleadings and issues, the parties went to trial. The plaintiffs relied on the act of sale of the 21st January, 1818, by their natural father, of the property in question, in which he acknowledges that he sells and conveys the same to Marie Adelaide, f. w. c., and the mother of the plaintiffs, who was present, accepting said sale for her children, who were all minors. Grounx, in the same act, acknowledges the said minors to be his natural children by the said Adelaide.

Abat's executors showed, by parole testimony, that this act of sale was well known to both parties at the date of the deed of transaction, and that the plaintiffs had been advised by counsel that it was a nullity. They introduced in evidence the transaction itself, in which both parties, being duly represented, settled and compromised all their difficulties, rights and law-suits up to its date, the 3d October, 1832. Grounx in his will, which was written in 1819 (also in evidence), acknowledges the plaintiffs to be his natural children, and gives them the right to take the property now in contest at its estimated price in the inventory, in lieu of certain legacies which he leaves them. In February, 1821, Grounx and Adelaide both signed a notarial act, in which they

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declared the act of 1818, under which the plaintiffs now claim, simulated, that no price was ever paid or intended to be paid, *and they cancel it.* This act was produced in evidence. Abat was appointed dative executor of the succession of Grounx, after his death in 1823, under the will which was established and ordered to be executed. The property now in contest was inventoried at five thousand dollars, was sold at public sale by the register of wills for four thousand nine hundred and fifty dollars, the net proceeds being four thousand eight hundred dollars; one half or two thousand four hundred dollars, was paid over by the executor to Adelaide, the natural tutrix and mother of the plaintiffs, for their use and as their share of their natural father's estate under the will. Adelaide afterwards made a surrender of her property, and put her children on her bilan as privileged creditors for the sum of two thousand four hundred dollars, received from their father's estate. This sum was also put on the tableau of distribution to their credit, which was duly homologated by a judgment of the court. The evidence further showed that the plaintiffs, or some of them, received their portion of this money.

The parish judge considered the act of sale under which the plaintiffs claimed, as a *nullity;* that it was cancelled by the act of the parties afterwards, which rendered it unnecessary to go into an examination of the validity of the transaction or compromise. He gave judgment for the executors of Abat, and dissolved the injunction.

Judgment was signed on the 6th May, 1833. The plaintiffs presented their petition, and prayed an appeal to the Supreme Court, on their giving security in such sum as the court might direct *for the costs of the appeal.* On the 11th May the judge granted the appeal, and required the appellants to give security in the sum of *one hundred and fifty dollars,* returnable to the *third Monday of the next month.*

On the 20th May, *D. Seghers,* counsel for Abat's executors, obtained an *alias* order of seizure and sale against the disputed premises, on showing to the court that the judgment dissolving the injunction, had been notified to the plaintiffs

more than *ten days*, and that the appeal was only *devolutive*, security being given *for costs only*.

Magnin, counsel for the plaintiffs, took a rule on Abat's executors, to have the above order set aside, on the ground that the appeal, having been taken within ten days from signing the judgment, was *suspensive*, especially as the plaintiffs had given security in the injunction in the sum of two thousand dollars, which bond was still in force. On the 22d June, judgment was rendered on the rule, maintaining the *alias* order of seizure and sale. From this judgment the plaintiffs also appealed, giving security for *costs only*.

Magnin, for the plaintiffs. The decision of this case depends principally on two questions:

1. Were minors Grounx free, at the date of the sale of January, 1818, to their mother, for their benefit, of the property in question; and, secondly, is this sale valid?

2. The plaintiffs were free, because their mother was emancipated in 1804, long before their birth; they were consequently born free, and baptized as free-born. In all these proceedings, they are treated as free persons of color.

3. We contend that the act of 1818, whether considered as a sale or donation, vested the property in the minors Grounx, which none of the subsequent acts of the parties could divest, either in attempting to rescind it as a sale, or revoke it as a donation.

4. The right to said property being vested in the minors Grounx, by said sale, and never being divested, continued to be their property at the date of the transaction or compromise.

5. The clause of the deed of transaction, which stipulates that the minors should pay a *price* for their own property, is not binding on them; because there is error in the motive. It is a nullity, and fraudulent as to them. *La. Code*, 1818, 2418, 1824, 5, 6, *and* 1875 *and* 6.

6. Two judgments have been rendered in this case; the second maintaining the *alias* order of seizure and sale of the property in dispute, notwithstanding the appeal taken from the first judgment, in the manner directed by law, to make it *suspensive*.

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7. The court below erred in granting the *alias* order, until the appeal from the first judgment was decided.

D. and *J. Seghers*, for Abat's executors and the appellees.

1. The donation by the late Grounx to his natural children, could not exceed the disposable portion, and the value of the property thus disposed of, was to be determined at the time of the donor's decease. This has been done. The lot of ground now claimed by the natural children of Grounx, was inventoried and sold, together with the other property of the said Grounx. The proceeds were divided between his sisters and his natural children; and by a final judgment of homologation, his natural children, *duly represented*, have received two thousand four hundred dollars, which was their share and all they could claim in their father's estate. This point is *res judicata* with regard to them, because the validity of a court of competent jurisdiction, cannot be examined collaterally by the parties thereto, or those who claim under them.

2. The same rule applies likewise to the judgment homologating the tableau of distribution of Adelaide Grounx's estate. Abat was her syndic, and the minors Grounx, *duly represented*, were parties to this suit. The said judgment is, therefore, *res judicata*, as to them; and it will be observed that among the property she surrendered to her creditors, was, first, this very lot which she had bought from Galez, who purchased it at the probate sale of the succession of Jean Grounx; and, secondly, a family of slaves belonging to her, and which Abat bought for her children, viz: for the minors Grounx, the present claimants.

3. The transaction or *compromise*, to which they were parties and *duly represented*, explains in the most satisfactory manner, that the two thousand four hundred dollars, coming to the minors Grounx, as their share in their father's estate (it being the amount of the disposable portion), never was in Abat's hands. The said disposable portion was first paid to their mother and natural tutrix.

4. When she failed, the said sum was employed by Abat in the acquisition of a family of slaves, which slaves are acknowledged by the above minors, in this very compromise, to have always been in their possession. The said slaves made no part of Grounx's estate, as it has been erroneously asserted, but belonged to Adelaide Grounx, the mother of said minors, before her failure, and were surrendered by her to her creditors.

5. The lot of ground now claimed by the minors of Grounx, cannot, therefore, be restored to them, since they have received from their natural father, all they could claim, viz: the disposable portion. If the contrary doctrine could prevail, the minors Grounx would receive at once *the price* and *the thing*; which would lead to an absurdity.

6. The appellees further contend that, notwithstanding the pretended discovery of the pretended deed of sale, which in fact was never concealed except by the appellants themselves, the transaction or compromise must, nevertheless, prevail, under the provisions of the *La. Code, art.* 3050.

Fourchy, for J. B. Grounx, tutor to the plaintiffs, urged that the motives which induced the execution of the deed of transaction, were to avoid a law-suit which was about to be commenced against Abat's executors, for damages sustained by the minors Grounx, arising from unfaithfulness in Abat's different stations of attorney in fact of Grounx, as dative executor of Grounx's estate, as syndic of Adelaide's creditors, and as syndic of the creditors of Rosileitte Pradere, who was indebted to the estate of Grounx.

Preston, for the plaintiffs, and in reply.

1. The plaintiffs made opposition to the seizure and sale obtained by Abat's executors, on the ground that the land belonged to them by a sale from Jean Grounx, their father, to their mother, Marie Adelaide, for them, by a deed dated the 21st of January, 1818. Some of the records show 29th, instead of 21st; but this is an error. They base their opposition upon *art.* 2418 *of the La. Code.*

2. To their opposition it is seriously urged, that they were slaves on the 21st January, 1818, and therefore incapable of

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acquiring property from their father, Jean Grounx. If they were slaves in 1818, they are so still, as no subsequent act of emancipation has been produced.

3. The executors of Abat are estopped from making this defence, because if the plaintiffs are slaves, incapable of making opposition to legal process, they are equally incapable of being proceeded against. If by reason of their slavery in 1818, they could not acquire property, their condition has not been altered so as to contract an obligation in 1832.

4. Again, there is no proof that they are slaves. An act of emancipation of their mother is produced; but neither the mother nor her children were parties to it, and are not, therefore, proved by the act to have been slaves.

5. The minors Grounx, being the children of Jean Grounx, were enfranchised by the mere act of treating them as freemen without any formality whatsoever. 4 *Partida, tit.* 22, *law* 2. *Institutes, book* 1, *tit.* 5, *l.* 1.

6. The act of the 21st of January, 1818, is a sale of the property in question to the minors Grounx. *Civil Code*, 263, *art.* 21. 5 *Martin, N. S.* 633. This sale has never been annulled by suit as fraudulent, and could be annulled only *by creditors. La. Code*, 1973, 1988. But there were no creditors. The suit to annul it, moreover, is prescribed. *Ibid.* 1989.

7. This act was not a disguised donation, because it has not been *proved* to be such: it has not been *attacked* as such; it could only be attacked by *forced heirs. La. Code, art.* 2419

8. If the act of the 21st of January, 1818, transferred the property to the minors Grounx, the sale to them of the same property by the transaction is null, and the price not recoverable. *La. Code, art.* 2418.

9. There was no transaction on the act of 1818, for it was either not exhibited at all, or was regarded by the family meeting as a nullity. If it was not *exhibited* at all, or being exhibited was treated as a *nullity*, the transaction was made as to it, entirely in error; and is not, therefore, binding upon the minors Grounx. *La. Code, arts.* 1818, 1819, 1835.

10. If the property was transferred to the minors Grounx, by the act of 1818, they have never been divested of it, and could not be by the acts of Grounx or Adelaide afterwards.

11. It is said, finally, that the children of Jean Grounx have lost their recourse upon this property, by sharing its proceeds as his testamentary heirs; that they cannot have the price and the thing. They were not testamentary heirs; but only *legatees* of one-half of his estate. Their legacy cannot be reduced on account of debts, and can only be reduced by an action in behalf of the forced heirs. *La. Code*, 1491.

12. By the settlement of Grounx's succession, their mother is made to receipt to Abat, as dative executor, for two thousand four hundred dollars; and by Abat's account, as syndic of her creditors, nearly the same sum is brought in as a privilege credit in favor of the children. But, by the compromise, it is seen that the two thousand four hundred dollars had never been paid, and the executors transfer in payment of that sum a family of slaves.

J. Seghers, for appellees, in conclusion.

1. The second judgment appealed from, and maintaining the execution of the order of seizure and sale, notwithstanding the appeal, is correct, because security is only given for costs. The appeal is not *suspensive*.

2. All the facts we have alleged, as actual owners of the lot in question, when we conveyed it to to the plaintiffs by the act of compromise, are to be found in the record. The appellees are subrogated to the right of the forced heirs of Grounx, who have received the price. They are in fact the assignees of those heirs.

3. As to the family of negroes mentioned, there is neither proof nor allegation on record of the pretended ownership of the late J. B. Grounx. There is, on the contrary, evidence of the slaves having been the property of *Adelaide;* for it appears those slaves were surrendered by her to her creditors; and on this point, the judgment of homologation of the tableau of distribution is *res judicata* against the appellants.

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Bullard, J. delivered the opinion of the Court.

The controversy in this case, grows out of a transaction or compromise, entered into between the minors Grounx, natural colored children of Jean Grounx, deceased, and the testamentary executors of Antoine Abat. This compromise, made in pursuance of the advice of family meetings, on both sides, recites that Antoine Abat, having been in his life-time, successively, the attorney in fact of their natural father, dative executor of his last will, syndic of the creditors of their natural mother, Marie Adelaide, a f. w. c., and finally syndic of the creditors of Rosiliette Pradere, a debtor of their father; and difficulties having arisen on the part of the said natural children, touching the manner in which Abat had performed these different successive duties, and a law-suit, being about to be instituted by them, against said Abat, in his life-time, a *projet* of a transaction had been drawn up, in order to terminate amicably, the differences existing between them, by which *projet* Abat was to *retrocede* to them certain property, and slaves, which had been the property of their father. Before this *projet* had ripened into a contract, by the final consent of the parties, Abat died. His executors then came forward, and with the advice of a family meeting, finally concluded the transaction on the 3d of October, 1832. It is therein stipulated, that the minors renounce every kind of reclamation, which they might have against the succession of Abat, on whatever account it may be, and particularly on account of any want of formality or other, whatever, in the acts of the different administrations above mentioned. The executors, on their part, transfer to the minors, a family of slaves, and a certain lot, and the improvements thereon, situated at the corner of the Bayou Road and Rampart-street. The price of the slaves, is declared to be the sum of two thousand four hundred dollars, due to the said heirs of Grounx, by privilege according to the tableau of distribution made by Abat, as syndic of the creditors of Marie Adelaide, their mother, for the share of those children, in the estate of their father, as appears by the executor's account of his administration of that estate, which sum remaining in the hands of

Abat, he had employed it in purchasing for them, the said family of slaves. They give a full and final acquittance and discharge of the sum thus due to them. The price of the property on the Bayou Road and Rampart-street, is declared to be four thousand nine hundred dollars, payable in December following, and secured by mortgage. The parties finally declare, that in consideration of this transaction, they remain mutually released, from all demands and claims *whatever, on whatever account they may be.*

The price of the lot of ground, not being paid when it fell due, the executors of Abat obtained an order of seizure and sale, and the minors Grounx, represented by their under tutor, made opposition, and obtained an injunction, on the grounds, that the lot and appurtenances were, at the time of the transaction, already their own property, by virtue of a sale, made by their natural father to them, on the 21st of January, 1818, passed before a notary public; that there was, therefore, error in the transaction, as they could not purchase, what was already their own, and that no mention is made in the transaction of the deed above recited. They conclude by a prayer that the property may be deemed to belong to them, in virtue of the act of sale of the 21st January, 1818, and that their tutor may be ordered, not to pay to the executors of Abat, any part of the price, and that the transaction may be declared null, so far as it relates to the sale of the aforesaid lot of land.

In their answer to this petition, the executors of Abat admit the transaction, but deny that it was entered into in error, or procured by unlawful means. They aver, that the act of the 21st January, 1818, was well known to all parties, at the time the transaction took place, to be a perfect nullity. They set out several grounds, on which they aver it is null and void. 1st. That it wanted consideration, and was evidently a disguised donation. 2d. As a donation it contained conditions contrary to good morals. 3d. It was not recorded with the recorder of Mortgages. 4th. That it exceeded the disposable portion of the donor's estate. 5th. That it was afterwards acknowledged and declared by the donor, to be a mere donation in his testament of the 5th October, 1819.

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6th. Because the natural father and mother, afterwards in 1821, by notarial act, declared said act to be feigned and simulated, and they expressly annulled and revoked it. 7th. Because the same property was afterwards inventoried, and sold by the Court of Probates, as a part of the succession of their natural father. 8th. Because in the settlement of said succession, the minors received their shares, of the price for which the property now claimed, was sold ; and 9th. Because the said minors were slaves, at the time of the pretended purchase and incapable of contracting.

The act of sale or donation, out of which this controversy has arisen, is in substance as follows. Grounx, the natural father of the plaintiffs, acknowledges that he sells and conveys to Marie Adelaide, f. w. c. present and accepting as purchaser for her children by name, all minors under the age of puberty, the lot of land in question, for the price of five thousand dollars, which he acknowledges he has received out of the view of the notary and witnesses, renouncing the exception of *non numeratâ pecuniâ*. He acknowledges that the children are his natural children, by the said Adelaide. The usufruct of the property, is expressly reserved to Adelaide during her natural life, but it is stipulated, that at her decease, the property shall pass, of right to the said minors, to be by them holden jointly, or to be divided in equal portions among all the children of Adelaide, who shall have been duly acknowledged by the vendor, at the time of his death.

Two questions are presented by the pleadings for the consideration of the Court. 1st. Did the minors Grounx, acquire a title to the lot of land, by the contract above recited ? and 2d. If so, has their title been divested by the sale of it, which was provoked by Abat, as a part of their father's estate, by their claiming and receiving a part of the price, as testamentary heirs, in virtue of a judicial decree, and finally by the transaction in question ?

Where colored persons have been treated with as *free* in a certain transaction or compromise,

We leave out of view, altogether, the question which is raised, touching the liberty of these minors. Having treated with them as free, the representatives of Abat could not be received to question their capacity, with a view of

avoiding the contract, as relates to the succession, much less for the purpose of depriving them of the common privilege of all parties to a contract, that of contesting its validity, on the ground of error or fraud.

their freedom and capacity to enter into such an engagement, cannot afterwards be questioned by the other party with a view of avoiding the contract, on the ground that they were slaves; much less for the purpose of depriving them of the common privilege of all parties to a contract, i. e. that of contesting its validity on the score of error and fraud.

The view which the Court has taken of the second question, renders it unnecessary to decide, what rights were acquired by the minors, in virtue of the act of January, 1818. Assuming, that on the death of their mother, they would have been entitled to the property as purchasers, or as donees, of their natural father, we come at once to the principal question in the cause, have they lost those rights by their own acts or consent, or are they precluded from enforcing them by any judgment of a Court of competent jurisdiction, which as to them, in relation to this property, has the authority of the thing adjudged?

In 1821, Grounx, and Marie Adelaide, went before a notary and declared that the act above referred to, was a simulation; that no price was paid, and that the vendor never intended to divest himself of his title, and they formally annul and cancel the contract. It is hardly necessary to state so plain a proposition, as that the title acquired by the minors, could not legally be divested, by such an act alone. Their mother had the capacity to acquire for her children, but she was incapable of annulling their title, by her mere consent.

In the course of the same year, Grounx made his last will and testament, which after his death, in 1823, was ordered to be executed by the Court of Probates. By this will, he acknowledges these same natural children by Adelaide, and declares, that, in order to provide for them the means of subsistence, according to the dictates of humanity, he bequeaths to them a moiety of all the property, moveable and immoveable, which he shall leave at his death, in case his two sisters, whom he institutes as his heirs, or either of them should survive him; but in the contrary case, he gives them three-fourths, and in either case, he gives his natural children the right of taking, if they think proper, at the estimated value, stated in the inventory, the lot with the house and other buildings and appurtenances, *belonging to him, situated at the*

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corner of the Bayou Road and Rampart-street, the same property now in controversy. The executors named in the will, declined to accept the charge, and Antoine Abat, was appointed dative executor. The lot above mentioned, was estimated in the inventory at five thousand dollars, and was sold at public sale, by the Register of Wills, for the sum of four thousand nine hundred and fifty dollars. According to the tableau, filed by the executors, the net proceeds of the estate amounted to four thousand eight hundred dollars, of which one-half appears to have been paid over to Marie Adelaide, as tutrix of their minor children, and the other half to the instituted heirs. The tutrix consented to the final homologation of the account, and the account of the executors was finally approved and homologated, by a judgment of the Probate Court, "*as consented to by all parties concerned.*"

This is one of the administrations, the irregularities or informalities of which it was the object of the transaction between these parties to cure. What were those irregularities and nullities, as relate to the minor legatees, and of which they had a right to complain? There occur to us, from an examination of the record only four: 1st. That the executor caused the lot in question to be inventoried, as a part of the estate, and disregarded their title by the deed of 1818, of which he had knowledge. 2d. That they had a right to take the property at its estimated value, in part or in lieu of their legacy, by universal title. 3d. That it was sold for less than its appraised value, and 4th. That the homologation of his account, was procured by the consent of their tutrix, and not pronounced contradictorily with them.

The executor is bound to administer on all the property of a succession which is expressly declared in the will by the testator to form a part of his estate; even on property claimed by an adverse title, unless inhibited by competent authority.

It is a sufficient answer to the first, that it was the duty of the executor to maintain the will, and as the lot in question was expressly declared by the testator, to form a part of his estate, the executors could not avoid administering upon it as such, unless inhibited by competent authority. 2d. and 3d. How could the minors complain that the property had been sold, and they deprived of the privilege of retaining it, on account of their legacy at its appraised value? The very right to retain it under the will, implies necessarily, that the

property belonged to the estate, and not to themselves. It is difficult to conceive, how they could claim, as legatees under the will, without giving up their own pretensions, to the property, by an anterior conveyance. The intention of the testator clearly was, to give them the disposable portion of his property, including, as a part of it, the lot of land and buildings, at the corner of the Bayou Road and Rampart-street. They cannot, at the same time, take their legacy and repudiate the will. Their tutrix acknowledges, that she had received for her children, the sum of two thousand four hundred dollars, one-half of the net proceeds of the estate, including the price of the lot in question. But it is objected 4thly, that the judgment of the Probate Court, approving the executor's account, was rendered by consent of parties. Admitting that this judgment was not conclusive; that the minors might have been relieved against it, it is clearly provided for by the transaction. If the expression used in the transaction; *De quelque défaut de formalité ou autre, que ce soit dans les actes de ses différentes administrations,*" do not comprehend all the above enumerated acts or omissions, we are at a loss to know to what they do apply.

Persons claiming as legatees under a will cannot set up title to property under an anterior sale and conveyance, which is expressly delared in the will to form a part of the estate of the testator.

A transaction entered into on the part of the minors, duly represented, and made according to the forms of law, will cure defects in a judgment which was not conclusive, and against which the minor might otherwise be relieved.

But we come next to examine the administration of Abat, as syndic of the creditors of Marie Adelaide, the mother and tutrix of the plaintiffs. After she had received her children's share in their father's estate, she made a *cessio bonorum.* Among her creditors, she enumerates her children, represented by Nicolas Monrose, as curator *ad lites* for one of them, and under tutor for the rest, for two thousand four hundred dollars, for their inheritance in the succession of their father, by tacit mortgage, from the 22d May, 1824. The under tutor and one of the minors, personally assisted by his curator *ad lites*, appeared before the notary at the meeting of the creditors, swore to their claim as above described, and voted for syndic. A tableau of distribution was afterwards filed by Abat, as syndic, a rule taken on the creditors, to show cause why it should not be homologated, and finally no cause having been shown, was homologated by judgment of the District Court. This judgment appears on the face of it, to be binding on all the parties.

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Where the curator *ad bona* of a minor above the age of puberty, purchased property for the use and in the name of his ward, at the sale of his father and mother's estate, and during his minority, in an action of partition he is charged with his share of the estate thus purchased and received, by a judgment of the Probate Court: In an action to set aside the purchase as having been made without his concurrence and consent: *Held*, that he was precluded by the judgment of the Probate Court so long as it stood unreversed.

Where the price of minors' property has been received by their tutor, and placed to their credit on a tableau of distribution of the tutor's estate, which is homologated by a judgment of the Probate Court, is unappealed from, the minors are precluded from setting up title to the property itself so long as the judgment of homologation

The claim by the minors was necessarily composed, in part, of the price of the property, to which they now set up title, and which had been received by their tutrix from the executor of their father's will. It rests on the hypothesis, that the lot remained the property of their father, that it was disposed of by his will; that they acquiesced in the will and its execution, by receiving their legacy, representing one-half of the the estate in money; and it appears to the Court, wholly inconsistent with the pretensions of the plaintiffs to claim the lot in controversy.

In the case of *Martin* vs. *Martin's heirs, et als.*, the plaintiff was a minor over the age of puberty. His curator, *ad bona*, without his concurrence, purchased real estate and slaves, at the sale of his father and mother's estate in his name, on account of his share in the estate. During his minority, in an action of partition, in which he was represented by a curator *ad lites*, he was by judgment of the Probate Court, charged with his share of the estate thus received by his curator *ad bona*. He afterwards sued to set aside the purchase, as having been made without his concurrence and consent. But this Court held that he was precluded by the judgment of the Probate Court, so long as that judgment stood unreversed. 5 *Martin, N. S.* 165.

That case is strongly analogous to this, and we think the same principle will apply. While the judgment of homologation subsists, showing that they had received the price of the property in question, as a part of their father's estate, the minors are precluded from setting up a title to it as their own. This is indeed a much stronger case than the one quoted, because in that case, the Probate Court would have been without jurisdiction to decide on the authority of the curator *ad bona*, to purchase for his ward, if that question had been brought directly before it, and in this the District Court having general jurisdiction, was competent, in whatever shape the question may have been presented.

Thus far we have examined this question, in a great measure independently of the transaction or compromise, we have considered the rights of the parties in relation to the

property, mainly according to the evidence relating to the different administrations of Abat, sanctioned by judicial authority. We have looked at it, as if no such transaction existed, and this suit had been brought directly for the property, under the title of January, 1818. Let us examine how the matter stands under the compromise, and whether such error has been shown, as will vitiate the contract.

subsists showing they have received the *price*.

Transactions according to the Code, have, between the parties, a force equal to the authority of the thing adjudged, and when the parties have compromised, generally on all differences which they might have had with one another, the titles which they know nothing of, and which were afterwards discovered, are not a cause of rescinding the transaction, unless they have been kept concealed on purpose, by the act of one of the parties. *La. Code, arts.* 3045 *and* 3050.

Transactions have between the parties the authority of the thing adjudged. And where the parties compromise generally on all differences, the titles which are unknown and afterwards discovered, are not cause for rescinding the transaction, unless they have been concealed purposely by one of the parties.

The renunciation of all claims and demands in this act of compromise, is as general as words could well make it, and there is no evidence that the latent title of 1818, was concealed on purpose, by the executors of Abat. It has been said, that it was not taken into view at all. Admit that it was not. Still it is certain, that the parties had in view, the administration of Abat, as executor of Grounx, and as syndic of the creditors of Marie Adelaide, and it must have been known to both parties, that the property now claimed, had been sold by the executor, as a part of the estate. There is one clause in the transaction, not a little remarkable, and which seems to us conclusive. The price of the slaves conveyed by the executors of Abat, is declared to be two thousand four hundred dollars, "due by privilege to said minors Grounx, according to the tableau of distribution, deposited in the District Court, by Mr. Abat, as syndic of the creditors of Marie Adelaide, for the share coming to said heirs, in the succession of their father, as appears by the account of said succession, rendered by Mr. Abat, before the Court of Probates, which sum had been received by said Marie Adelaide Grounx, in her capacity of tutrix, according to her receipt in the Court of Probates." They go on to admit, that this sum had been employed in the purchase of the family of slaves, and they give a full

And where the renunciation of all claims and demands in an act of compromise or transaction is full and explicit, and no mention is made of a latent title to certain property included in the transaction, but no evidence showing that the title was concealed on purpose by the party, the transaction will not be rescinded.

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and final acquittance. This sum formed in part the price of the property now claimed, and after recovering the price, they cannot claim the thing.

Judgments rendered by courts of competent jurisdiction, against minors, duly and legally represented, so long as they are not reversed or declared to be null, have the same force and validity as if the parties were both of full age. In the case before the Court, the judgment homologating the tableau in the *concurso* of Marie Adelaide, and that approving the account rendered by Abat as executor of Grounx, rest on the hypothesis, that the property in dispute, formed a part of the succession of Grounx, of which one-half was bequeathed to the plaintiffs, and it was adjudged, that they should receive one-half of the price in lieu of their legacy. The subsequent transaction adopted the same hypothesis, confirms the former judgments, cures all the irregularities and nullities in the administration of the estate, and has, as to all those matters, the authority in itself of the thing adjudged.

Judgments rendered by courts of competent jurisdiction against minors duly and legally represented, so long as they are not reversed or declared to be null, have the same force and validity as if the parties were of full age.

Upon the question, whether this appeal should be considered as suspensive, or merely devolutive, we agree with the judge *à quo*, that security having been given, merely and expressly for costs, the execution of the judgment below, was not suspended by the appeal. The injunction bond, given at the inception of the suit, cannot be cumulated with the appeal bond. The conditions of the two bonds, are essentially different. The security on the injunction bond, is not bound for any part of the judgment to be rendered on the appeal, except for damages; he is liable only for such damages as the party may have sustained, if it should appear that the injunction was wrongfully obtained.

In an appeal where security is given merely and expressly for costs, the execution of the judgment below is not suspended thereby. It is not a suspensive, but merely a devolutive appeal.

An injunction bond given at the inception of the suit, cannot be cumulated with the appeal bond given in the same suit on appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court, be affirmed with costs.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

WESTERN DISTRICT.

BATON ROUGE, AUGUST, 1834.

VIDAL'S HEIRS *vs.* DUPLANTIER.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The Spanish law required as an indispensable solemnity to the validity of a testament or will, that it should be signed by the testator and witnesses, or by some one of the witnesses for him or them at least.

The principle has been settled, that according to the Spanish law it is not absolutely necessary for the validity of a testament or will, that all the required solemnities should appear on the face of the testament itself; but that some apparent defects may be cured or supplied by proof, when the instrument was offered for probate.

In a petitory action, when the plaintiffs fail to show title in themselves, it will not be deemed necessary to inquire into the validity of the proceedings in pursuance of which the property was sold to the defendant.

This is a petitory action. The plaintiffs, Caroline and Maria, f. p. c., the natural daughters of Nicolas Maria Vidal, late auditor of war, &c. in the province of Louisiana; state

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that their ancestor died at Pensacola in 1806, and that in his last will and testament he instituted them, with two other natural children, who are not now known to exist, his *universal heirs*. That at his death the testator was owner and proprietor of five tracts of land lying principally in East Baton Rouge, amounting together to sixteen thousand arpents, which was granted to one J. B. Labatut by the Spanish government, in the year 1803 or 4; and by him conveyed to their ancestor. They further state, that Fergus Duplantier, of the Parish of East Baton Rouge, hath unlawfully taken possession of the titles to said land, and continues to withhold them from the petitioners, who are entitled to them in the absence of other legatees. They allege the value of said land titles, to be at least sixteen thousand dollars, and that they have amicably demanded them from the defendant, who refuses to deliver them: They pray judgment for the delivery of said titles to them, or their value in damages, as alleged, and costs.

The plaintiffs propounded two interrogatories to be answered by the defendant:

First, Have you or not, the Spanish grant for sixteen thousand arpents to J. B. Labatut, as described in the petition?

Second, What is the date of said grant?

The defendant answered: *First*, "I am in possession of a Spanish grant of sixteen thousand arpents, in five different tracts, &c., as described in the petition, which was issued by Juan Ventura Morales, Spanish Intendant, to J. B. Labatut. [*I am the legal and bona fide owner of said titles by regular chain of transfer, having paid the price thereof.*"]

Second, "The said grant bears date the 20th January, 1804."

The words in *italics and brackets*, in the first answer, were objected to by the plaintiffs' counsel as uncalled for, and stricken out by the court.

The defendant, in his answer to the merits, pleaded a general denial; and denied specially that the plaintiffs were heirs of Vidal, or entitled to any legal right under his will: He further states he is the legal owner of the tracts of land

claimed by the plaintiffs; having purchased them for the sum of six thousand dollars from one Perrin, through his authorised agent, by act *sous seing privé*, bearing date the 9th May, 1811. Perrin acquired said property by adjudication to him, on the 27th June, 1808, by Carlos Grandpré, Governor of the district of Baton Rouge, under a decree of the Spanish tribunal at Pensacola, for a debt of four thousand dollars, secured by mortgage, due by the estate of Vidal. He alleges he has been in the actual possession of a considerable portion of the land, ever since his purchase, and instituted suit for the remainder, when the plaintiffs failed to intervene therein, or assert any right thereto. He pleads the prescription of twenty years, and prays that the plaintiffs' demand be rejected, and that he be dismissed with his costs.

The facts of the case show, that Nicolas Maria Vidal was auditor of war under the colonial government of Louisiana, when Gayoso was governor, and resided in New-Orleans. In 1798 he made his will by notarial act, before Pedro Pedesclaux, notary public, and three persons named as witnesses, *but does not sign himself.* In this will the plaintiffs are recognised, with two others, as the natural children of the testator, by a colored woman. Vidal left New-Orleans about the time of the change of government in 1803, and resided in Pensacola, where he died in 1806. The grants of land in controversy, were made by Morales the 20th January, 1804, to J. B. Labatut; and the sale from the latter to Vidal, was dated the 25th February, 1804. In June, 1827, the plaintiffs presented a petition to the probate judge of East Baton Rouge, in which they claim the possession of the estate of Vidal under the will, and pray to be recognised as universal legatees; that an inventory be made of the sixteen thousand arpents of land, and all the other property of Vidal's estate. A decree was rendered, in accordance with the prayer of the petitioners, contradictorily with an attorney appointed to represent the absent heirs. An authentic copy of the will was annexed to this petition, and made a part of the proceedings.

The introduction of the will in evidence, was opposed by the defendant, on the ground that it had not been admitted to probate, and was never ordered to be executed; and that it was null and void, not being made according to law.

The defendant offered in evidence, the *procès verbal* of the sale of the land in controversy, by Grandpré, upon which he relies as the foundation of his title. The decree ordering this sale, is dated the 6th May, 1808, and signed by the civil and military commandant of Pensacola and West Florida. It annuls a previous sale, made under a former order of the same tribunal, and orders a new one. It is stated in the decree, that the sale is ordered for the purpose of paying a mortgage creditor of the said estate. The decree and proceedings, of the Spanish tribunal at Pensacola, are only recited in the *procès verbal* of the sale made by Grandpré, which is alone in evidence. The plaintiffs' counsel objected to the admissibility of this document: *First*, because it purports on its face, to be the copy of a copy, and is not the best evidence the case admits: *Second*, that it is not legal evidence of a decree recited in it, for the sale of the lands: *Third*, that it does not correspond with the allegations of the answer, which refers to an original decree, for the sale of the land in contest: *Fourth*, it is not a full copy of the proceedings, but only an extract from the mortuary proceedings in the case of Vidal. The court overruled the objections, and admitted this document in evidence, to which decision of the judge, the plaintiffs' counsel excepted.

The adjudication of the land to Perrin, by governor Grandpré, is dated the 27th June, 1808. On the 9th of May, 1811, Perrin by his attorney in fact, sold and conveyed the premises to the present defendant.

The district judge was of opinion, the will was not properly admitted to probate; and that the defendant acquired a good title, under the decree and sale by the Spanish authorities, of the premises in contest. Judgment was rendered in favor of the defendant. The plaintiffs appealed.

Turner, for the plaintiffs.

1. The title to the property sued for, is clearly shown to be in the plaintiffs, by the will of Vidal.

2. The defendant has shown no legal title whatever. His deed of sale by the agent of Perrin, cannot avail him.

3. This instrument is an act under private signature, not recorded at a time not suspicious, but after the institution of this suit, which tends to render it suspicious.

4. The power of attorney from Perrin to his agent, did not authorise the sale to the defendant.

5. The defendant, nor those under whom he claims, have ever had a title; the forms of law, have never been complied with. The property belonged to minors. The pretended adjudication has none of the requisites or formalities to divest minors of their title.

6. The document given in evidence by the defendant, should have been rejected, or if received, it was evidence only of the sale, and not of any judgment authorising the sale; nor of a family meeting with the previous formalities which the law requires, in order to divest minors of their title to property.

7. The price of adjudication has never been paid. The judgment could only, in the worst view for the plaintiffs, have been one of *non suit*.

R. & A. N. Ogden, for defendant.

The plaintiffs have failed to establish any rights as heirs of Vidal. The heirship is specially denied; and the will under which they claim, having never been admitted to probate, is null and void. They can derive no right from it.

2. The proceedings instituted in 1827, in the Probate Court, do not furnish evidence of probate of the will. They were irregular, and not done in the manner pointed out by law, and can produce no effect. *Civil Code, p. 242 art. 153. Ib. 244, art, 162. La. Code, art. 1637, 1571. 3 Martin, N. S. 473. Ib. 458.*

3. The plaintiffs cannot claim as the testamentary heirs of Vidal, because being natural children, they should have

alleged and proven, that Vidal left neither descendants nor ascendants. *Civil Law of Spain, p.* 114. 12 *Martin*, 390.

4. The defendant by his answers to interrogatories propounded to him by plaintiffs, established his right to the title papers sued for. The part of the answer objected to, was improperly stricken from the record. 11 *Martin*, 217.

5. The defendant has made out a perfect title. The order of the Spanish tribunal at Pensacola, decreeing the sale of the land, was rendered by a competent authority, and cannot now be inquired into. It is a domestic and not a foreign judgment, and the proceedings on which it is found, are not required to be shown. 1 *Martin, N. S.* 165. 4 *Martin*, 301. *Ib.* 311. *Ib.* 157.

6. The copies of the originals, which were deposited in the office of the governor at Baton Rouge, were properly received in evidence. 7 *Peters*, 6. *Ib.* 714, 16, 17 *and* 24. *Civil Law of Spain*, 328.

Pichot, for the plaintiffs, and in conclusion.

1. The petitioners are testamentary heirs of Vidal, and his succession was acquired to them from the moment of his death. See *La. Code, art.* 934.

2. Their being sent in possession of the sixteen thousand arpents of land, by judgment of the Court of Probates for East Baton Rouge, is legal, and its validity cannot be collaterally impugned before a District Court. See *Civil Code, art.* 78. 6 *La. Reports, J. P. Dupré* vs. *Widow C. Reggio et als.*

3. At the time of the death of Vidal, the petitioners were minors, and could be dispossessed of their rights, but by a strict compliance with the formalities required by the Spanish law: a tutor ought to have been appointed to them. See 6 *Partidas, t.* 16, *l.* 12.

He could not sell their property, except for a valid cause, which was to be mentioned in the deed. 6 *Partidas, t.* 16, *l.* 18. For example, for debts; and in that case, the landed property was to be sold at public auction, in a delay of thirty days from the first notice, and the deed of sale was to be made in

conformity to law 60, *t.* 18, *p.* 3; which was not done in this case.

4. The adjudication made to Sabin Perrin, of whom Fergus Duplantier is the vendee or *ayant-cause*, is radically null and void; 1st. Because the property sold on a writ of seizure and sale, ought, according to the Spanish law, have been sold after three publications and three public notifications of auction, which, for immoveable property, must take place every nine days, so that there be a delay of thirty days: in this case, but eighteen days elapsed. See *Febrero, part.* 2, *l.* 3, *ch.* 2, §3, *p.* 383, *n.* 136, 168.

2d. Because the other formalities prescribed by law, have not been complied with. See *Febrero, part.* 2, *l.* 3, *ch.* 2, §3, *p.* 404, *n.* 168, 169.

3d. Because the deed of adjudication is not made in conformity to law. See *Febrero, part.* 2, *l.* 3, *ch.* 2, § *final*, *p.* 540, *n.* 415.

4th. Because the adjudication has not been approved in conformity to law. See *Febrero, part.* 2, *l.* 3, *ch.* 2, § *final*, *n.* 416, 417.

5th. Because, had even the preceding formalities been complied with, still the adjudication would be null, because the bond and security which were to form the completion of the sale, have never been furnished, and it has, consequently, never been perfect.

The argument drawn from prescription, cannot be legally made use of by the defendant. He never had actual possession; legal possession, based on a title under private signature, can be opposed to third parties, but from the day of the registry in the office of a notary public. See *Civil Code, art.* 2242.

The deed under which the defendant claims, was recorded only in March, 1834.

Bullard, J., delivered the opinion of the Court.

The plaintiffs allege, that they are the instituted heirs of Nicolas Maria Vidal, and sue to recover the title papers of certain tracts of land, amounting in all to sixteen thousand arpents, which they aver, the defendant unlawfully withholds from them.

The defendant specially denies, that the plaintiffs are the children and heirs of Vidal, under whom they claim, or that they are entitled to any rights as such, by testament or otherwise. He further sets up title to the land, under a judicial sale, made by Grandpré, military and political governor of Baton Rouge, under authority derived from Don Vicente Folch y Juan, governor of West Florida, in the course of the administration of the estate of Vidal.

The plaintiffs, in support of their pretensions, gave in evidence a document, purporting to be the testament of Vidal, dated in 1798; and an order or judgment of the Court of Probates, for the parish of East Baton Rouge, that the petitioners be recognised as universal legatees of Vidal, for the sixteen thousand arpents of land, bequeathed by the will, and authorising them to exercise all the rights of ownership to the same. The judgment was rendered on the 27th of July, 1827, in a proceeding to which it is not pretended the present defendant was a party.

As the plaintiffs claim only as natural colored children and instituted heirs, and do not pretend to be the heirs at law, our first inquiry is in relation to the testament, which forms the basis of their pretensions. On a careful examination of the copy in the record, certified by a notary public, it does not appear to have been signed either by the testator or the witness whose names are mentioned in the body of it. The certificate of the notary, before whom the testament purports to have been made, is in the following words: "*Yo, el escribano, doy fé, conozco al señor Ortogante, que está al parecer en su entero juicio, memoria y entendimiento natural, y lo firmé, siendo testigos el señor don Gilberto Leonardo, contador interino de exto. y real hacienda; don José Maria de la Barba, ministro interventor; y don José Maria de Peña. Ante mi, Pedro Pedesclaux, not. público.*"

It is not so clear from the copy, whether the words, used be *lo firmé*, I signed it, or *lo firmó*, he signed it; nor does it appear material, in as much as the signature of the testator does not appear, nor that of either of the witnesses.

The Spanish law required as an indispensable solemnity, that the testament should be signed by the testator and witnesses, or by some one of the witnesses for him or them at least. *Febrero, part.* 1, *chap.* 2, *sec.* 1, *Nos.* 10 *and* 12.

This Court recognised on one occasion, the principle, that according to the Spanish law, it was not absolutely necessary for the validity of a testament, that all the required solemnities should appear on the face of the testament itself. That there may be cases, in which some apparent defects might be cured, and supplied by proof, when the testament should be offered for proof before the proper tribunal, we do not question. But in this case, it does not appear that the testament was ever recognised as such by judicial authority, and ordered to be executed. The proceedings had before the Court of Probates, for the parish of East Baton Rouge, more than twenty years after the death of the testator, does not purport to be a probate of the will, and an order for its execution. No notice is taken of the executors appointed. The supposed will directs the residue of the estate, if *any thing should remain to be inherited*, to be delivered in equal portions to four natural colored children, of whom the plaintiffs are two. It appoints J. B. Labatut and Christoval de Armas, testamentary executors, with full authority to take possession of the whole property, and pay the debts of the testator; and the period of executorship is prolonged beyond the regular period for that purpose.

The plaintiffs having failed to show any title in themselves, it is unnecessary to inquire into the validity of the procedings of the Spanish tribunal, in pursuance of which the land was sold as the property of the deceased Vidal; for it is clear that if the plaintiffs do not take under the will, they are without rights in as much as they are not the heirs at law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

The Spanish law required as an indispensable solemnity, to the validity of a testament or will, that it should be signed by the testator and witnesses, or by some one of the witnesses for him or them at least.

The principle has been settled, that according to the Spanish law it is not absolutely necessary for the validity of a testament or will that all the required solemnities should appear on the face of the testament itself; but that some apparent defects may be cured, or supplied by proof, when the instrument was offered for Probate.

In a petitory action, when the plaintiffs fail to show title in themselves, it will not be deemed necessary to inquire into the validity of the proceedings in pursuance of which the property was sold to the defendant.

WESTERN DIST.
August, 1834.

SMITH
vs.
CORCORAN ET ALS

SMITH *vs.* CORCORAN ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Without an assessment of a state tax, the officer has no warrant or authority to sell non-residents' land therefor, and which is indispensable to make out a valid title under a collector's sale for taxes.

The recitals in the treasurer's deed to land sold for taxes, is no evidence that it was legally assessed, as the fact of assessment was not within his cognizance.

If, in case of eviction of part of the thing, the sale is not cancelled, the value of the evicted part only is to be reimbursed, according to its estimate, proportionably to the total price of the sale.

Evidence, offered to prove the identity of a tract of land, and to correct errors in its description, is properly rejected as superfluous, when its identity is admitted in the pleadings.

Under the prayer for general relief, suited to the nature and justice of the case, the Supreme Court will render such judgment as would be given in a new suit, to avoid circuity of actions.

When there is no evidence of damages having been sustained, none can be recovered against a warrantor.

This is action of jactitation and slander of title to land, commenced by Peter Smith, residing in the state of Mississippi, against the defendant, residing in the parish of East Feliciana.

The plaintiff alleges, he is the owner, and in the actual possession of a tract of four hundred arpents of land, lying in the parish of East Feliciana; and that a certain Timothy H. Corcoran pretends to be the owner, and sets up a false and clamorous report of his title to said land, and injures and slanders the title of petitioner to his damage three thousand dollars; that said Corcoran has been amicably requested to desist from injuring and slandering the title of petitioner, but still persists in and continues it; wherefore, he prays, that Corcoran's title be decreed insufficient, and that he be perpetually enjoined from claiming title to said land, and from

slandering that of the petitioner, and condemned to pay all damages and costs.

The defendant excepts to the action, because the plaintiff is not in possession, and that the prayer of the petition ought to require the person setting up title, to bring suit for the recovery of the land, or be for ever debarred from setting up any right or title to it.

2. That plaintiff alleges he is in possession, as owner of the land, and does not show he has been evicted.

3. Because there is not sufficient cause alleged to maintain a possessory action, or an action of slander of title.

On the merits, the defendant pleaded a general denial; and alleges he is the owner of the tract in contest, containing six hundred and forty acres, which he purchased from one James Mooney, residing in New-Orleans, by authentic act, duly recorded, for the sum of four thousand dollars, and that he possesses by a good title and in good faith; and that, in case he is evicted, said Mooney is bound in warranty to defend his title, and calls him in warranty, and prays for the same judgment against his warrantor that may be rendered against him; for four thousand dollars, the price which he paid, and for one thousand dollars in damages and costs.

Mooney appeared by his counsel, and answered to the call in warranty. He made the same exceptions to the original action as his vendee, and pleaded a general denial to the merits; alleged title in Corcoran, and that he purchased the land by a complete title and for a *bona fide* consideration, and so possessed it, until he transferred it to his vendee in like good faith. He prays to be allowed one thousand dollars in damages and his costs.

The plaintiff exhibited a complete title to four hundred arpents, being the land in controversy, in a deed from John Foster and wife, dated 19th July, 1821. The defendant exhibited his deed from Mooney, dated 16th August, 1830, for six hundred and forty arpents, which was admitted to embrace the land in controversy, for which he gave four thousand dollars. Mooney exhibited the deed of the state treasurer to him, dated March 29th, 1828, by which he pur-

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chased this same tract of six hundred and forty arpents at a sale for the state taxes, for the sum of ten dollars. The state treasurer and public printer for 1828, proved that this land was returned by the sheriff or collector of taxes for East Feliciana, as non-residents' lands, with the state taxes due on it; that it was regularly advertised in the public papers according to law, and adjudicated to Mooney, for the sum of ten dollars. The treasurer's deed recited these facts, but there was no proof of the *assessment* of this tract of land for the taxes; the assessment rolls were not produced in evidence.

The jury returned a general verdict for the plaintiff, and in favor of the defendant against the warrantor for four thousand dollars, together with three hundred dollars damages. The warrantor moved the court for a new trial, which was overruled. By consent entered of record, this was considered as a *petitory* action. Judgment was rendered, decreeing to the plaintiff four hundred arpents of the land claimed, and restoring him to quiet possession; and that Mooney pay to the defendant four thousand dollars, the price paid by the latter, and three hundred dollars in damages and costs. Mooney, the warrantor, appealed.

Turner, for the plaintiff.

1. There is no error in the judgment against the warrantor. The treasurer was not authorised to sell the land in contest in the month of March, 1828, or at any other time. See *Session Acts* 1828, *p.* 190, §2.

2. The advertisements were not legally made. *Ibid.*

3. The recitals in the deed are not proof against the plaintiff; they are not similar to a sheriff's return on a *fieri facias*. 8 *Martin, N. S.* 657.

4. There is no assessment of the taxes shown, which is indispensable to the validity of a sale for taxes. 6 *Martin, N. S.* 347.

5. The return of the taxes due by non-residents, made by the deputy sheriff of East Feliciana, is not an official act. The sheriff's return by a deputy, does not afford proof that the

plaintiff was a defaulter for taxes. *Session Acts* 1817, *p.* 174, §10 *and* 11.

Lobdell and *Hennen*, for the warrantor.

1. The verdict and judgment thereon is erroneous, as being against law authorising the sale of the land for taxes, and against the evidence, which shows it was legally sold. The verdict should have been for the defendant. *La. Code, verbo Auction Sales, Acts* 1828, *p.* 30. 2 *Moreau's Dig.* 445 *to* 493. 5 *Martin*, 698, 221. 12 *Ib.* 534. 1 *Ib. N. S.* 179. *Ib.* 554. 3 *Ib. N. S.* 705. 4 *Ib. N. S.* 456.

2. The judgment between Corcoran and Mooney is erroneous, because the eviction extends to but four hundred arpents, and the quantity sold to defendant was six hundred and forty arpents, of which he has possession, leaving two hundred and forty arpents undisturbed. But the judgment decrees the return of the whole purchase money, when only a portion of the land is lost. The sum recovered cannot exceed the proportion it bore to the quantity of land recovered: as six hundred and forty is to four thousand dollars, so is four hundred to the true sum to be paid.

3. The warrantor was improperly required to pay three hundred dollars in damages, when the evidence does not show any were sustained by defendant.

Bullard, J., delivered the opinion of the court.

This is a petitory action, in which the plaintiff sets up title to a tract of land, of four hundred arpents, in possession of the defendant Corcoran, who cites Mooney as his warrantor.

The plaintiff exhibits as his title, a complete grant from the Spanish government to Maria Kelsey, and a conveyance from the grantee to him.

The defendants hold, under a sale by the state treasurer for state taxes, alleged to be due by the plaintiff, a non-resident. The tract was sold as containing six hundred and forty arpents, bought in by Mooney, and by him conveyed to Corcoran, for the price of four thousand dollars.

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As between the plaintiff and the original defendant, the only question relates to the validity of the alienation for taxes by the state treasurer.

Without considering sundry bills of exception, taken on the trial, our attention is drawn to one point, on which the case must turn. No assessment of a state tax is shown; and this court has already decided, that an assessment is indispensable to make out a valid title, under a collector's sale for taxes. Without it, the officer has no warrant or authority to sell *Nancarrow* vs. *Weathersbee*, 6 *Martin, N. S.* 347.

Without an assessment of a state tax, the officer has no warrant or authority to sell non-residents' land therefor, and which is indispensable to make out a valid title under a collector's sale for taxes.

Even supposing that the recitals in the treasurer's deed, ought to be taken as true, so far as they relate to what he did, or was within his knowledge, as contended by the counsel for the defendant, the fact of the assessment was not of his cognizance, nor could he know that the list returned to him, conformed to the assessment rolls. The rolls are of public record, in the parish where the land is assessed, and may easily be produced or accounted for. The fact that this sale was made by the treasurer, and not by the parish collector, does not alter the principle. As relates to the taxes due by non-residents, both the sheriff and the treasurer are collectors; the latter only, in failure of the sheriff to collect, and when it becomes necessary to resort to coercive measures.

The recitals in the treasurer's deed to land sold for taxes, are not evidence that it was legally assessed, as the fact of assessment was not within his cognizance.

The judgment in favor of the plaintiff, appears to the court, supported by the law and evidence. As between the defendant Corcoran and his warrantor, it is contended that it ought to be reversed, because it is erroneous in decreeing Mooney to pay back the whole price, when his vendee is only evicted of a part of the land, and in awarding damages against him, when none were proved to have been sustained; and that the warrantor sold and warranted a tract of six hundred and forty arpents; and his vendee in this suit, is evicted of four hundred arpents only.

"If in case of eviction of a part of the thing, the sale is not cancelled, the value of the evicted part is to be reimbursed to the buyer, according to its estimate, proportionably to the total price of the sale." *La. Code, art.* 2490.

If, in case of eviction of part of the thing, the sale is not cancelled, the value of the evicted part only is to be reimbursed, according to its estimate, proportionably to the total price of the sale.

But it is insisted, that this case ought to be remanded for trial, before another jury, because evidence was rejected by the court to the prejudice of the warrantor; and our attention is drawn to a bill of exceptions, taken by him. It appears, that his counsel offered witnesses, and other evidence, to prove that Peter Smith had but one tract of land, in the Parish of East Feliciana, in 1824; and further, to prove the true boundary of Smith's land, and to explain errors in the description of boundaries, in the deed to Corcoran. The evidence was rejected by the court. We think the court did not err. If the evidence was offered, to prove the identity of the land sold for taxes, with that claimed in this suit, it was wholly superfluous, because that identity is admitted by the pleadings. If the object was to prove any thing against, or beyond the contents of the act, it was inadmissible.

Evidence, offered to prove the identity of a tract of land, and to correct errors in its description, is properly rejected as superfluous, when its identity is admitted in the pleadings.

All the parties admit, that the tract of land sued for, is the same that was sold for taxes, and afterwards conveyed by Mooney to Corcoran, as a tract of six hundred and forty arpents. Although the eviction, technically speaking, may be only partial, yet here seems to be a total failure of title, on the part of the warrantor, shown by himself, for the whole amount.

This has seemed to the court, a case for the application of that provision of the code, which authorises the buyer to demand the rescission of the contract, when the part evicted is so considerable, that it is not to be presumed he would have bought, without the part evicted. *La. Code, art* 2487.

The only difficulty which has occurred to us, was a doubt whether the pleadings would justify such a judgment. On examining the record we find, that Corcoran in his answer, prays that Mooney may be cited in warranty; and in case the plaintiff should recover the land, that he may be condemned to refund the purchase money and damages; and he concludes, by praying "for all such further and other relief, as the nature of the case requires, and your honor shall be pleased to decree." This is in the nature of an original suit, and the most general prayer for relief. If we were to reduce the amount recovered against the warrantor, to twenty-five

Under the prayer for general relief, suited to the nature and justice of the case, the Supreme Court will render such judgment as would be given in a new suit, to avoid circuity of actions.

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hundred dollars, proportionably to the part evicted, we should reserve to the buyer, his right to have the sale cancelled in another suit, according to the provisions of the code. Under the prayer for general relief, suited to the nature and justice of the case, we think ourselves authorised to render such a judgment, as would be rendered in a new suit, and to avoid a circuity of actions.

When there is no evidence of damages having been sustained, none can be recovered against a warrantor.

The record furnishes us with no evidence of damages having been sustained, and none can therefore be recovered against the warrantor. *La. Code, art.* 2482.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and proceeding here to give such judgment, as ought in our opinion to have been rendered below, it is further ordered, adjudged and decreed, that the plaintiff recover, and be put in possession of the tract of land, described in his pitition, with costs. And it is further adjudged and decreed, that the defendant Corcoran, recover of his warrantor, James Mooney, the sum of four thousand dollars, together with all the costs of this suit, in the District Court, that the sale of Mooney to Corcoran, of the land in controversy, be cancelled and annulled, and that the appellee Corcoran, pay the costs of the appeal.

VINCENT *vs.* MICHEL.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A right of servitude which rests solely on the acquiescence of the plaintiff, in the burden imposed on his property, by suffering, without complaint, the *drip* from the defendant's house to fall on his lot or grounds for ten years and upwards, is acquired by prescription.

Where the possession or continuation of the servitude of right of *drip*, from the eaves of A's house on the lot of B, is proven to have existed more than ten years, B is barred from bringing his action of damages, or to abate it as a nuisance, against A.

An alteration, within the time allowed to acquire a servitude by prescription, which is made in the eave of the roof of the house of A, and which had a tendency to lighten the burden of the servitude, is *not considered* as an interruption, so as to prevent prescription from running.

This is an action commenced against the defendant, to compel him to abate a certain nuisance, and for damages sustained by the plaintiff, in consequence of its continuation.

The plaintiff states, that the lot of defendant is adjoining his, in the town of Baton Rouge, on which the former has erected his kitchen, so that the water falls from the roof into his lot, and runs on his house and kitchen, thereby causing great decay, injury and damages, by dampness and unhealthiness; and that the defendant has also erected a necessary, immediately adjoining the residence of the plaintiff, which nuisances occasion him great disquietude, and damage to the amount of three hundred and fifty dollars. He further alleges, that the defendant has been amicably requested to remove said nuisances, but has refused and failed to do so. He prays judgment for his damages, and that the defendant be condemned to remove his buildings, so as to prevent the *drip* therefrom from falling on his premises; and to abate the nuisance.

The defendant pleaded a general denial. He averred that the plaintiff, by planting pickets at each end of his kitchen, on defendant's lot, had prevented the water from running off, and which caused injury to his houses by decay, &c. That the plaintiff prevented his workmen from making repairs on his own premises, by reason of all of which injuries, he has sustained damage to the amount of five hundred dollars; for which he prays judgment in reconvention, &c.

This suit was instituted in May, 1833. The plaintiff alleges, that he had been disturbed and disquieted in the enjoyment of his residence by defendant, who, since the 2d March, 1830, had erected the nuisances complained of.

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The evidence showed, that the water had continued to run from the eaves of the defendant's house on to the lot and premises of the plaintiff for a number of years: about ten or twelve years, the witness stated. But a short time before suit, the defendant had altered the roof and eaves of his house, so as to throw the water in some manner different from what it had previously done.

The defendant, on the trial, interposed the plea of the prescription of one and ten years against the plaintiff's demand and right of action.

The cause was, on these pleadings and the evidence adduced by the parties, submitted to a jury, who returned a verdict "*for the defendant by prescription.*" After an unsuccessful attempt on the part of the plaintiff, to obtain a new trial, judgment was rendered in conformity to the verdict, from which the plaintiff appealed.

Brunot, for the plaintiff, contended, that the finding of the jury by prescription, is contradicted by the acts of the defendant, in which, it is admitted, he had no title to the servitude of drip, or, if he even had, that he had renounced it, by causing the roof of his house to be sawed off. *La. Code*, 3486.

2. The servitude of drip cannot be acquired, and title claimed to it by prescription. *La. Code*, 694, 707.

3. A servitude, if acquired, may be lost by a tacit admission of right. *La. Code*, 779.

4. This could and should set *aside* a verdict, when it is not supported by the evidence. 1 *La. Reports*, 174. 2 *Ibid.* 396. 3 *Ibid.* 353, 361.

R. & A. N. Ogden, contra.

Mathews, J., delivered the opinion of the court.

A right of servitude which rests solely on the acquiescence of the plaintiff, in the burden imposed on his property, by suf-

This is an action for damages, and to cause the defendant to abate certain nuisances, of which the plaintiff complains as interrupting him in the quiet and comfortable possession and enjoyment of his property. There was judgment for the

defendant in the court below, founded on a verdict of a jury to which the cause had been submitted, and the plaintiff appealed.

The case involves a right of servitude, as claimed by the defendant. The parties are separate owners of urban property, situated in the town of Baton Rouge, adjoining. The servitude claimed, is a right of drip from the house of the appellee on the lot of the appellant.

The verdict of the jury in favor of the former, is based on prescription. The record affords proof of the water having flowed from the roof of the defendant's house, on the land of the plaintiff, for ten or twelve years previous to the institution of the present action, in the same manner in which it did at that period.

In the present case, no written evidence of title is shown on the part of the appellee, by which he claims the servitude in question. His right of servitude rests solely on the acquiescence of the plaintiff in the burden imposed on his property, by suffering for ten years and upwards, without complaint, the drip from the defendant's house to fall on his lot.

The 761st article of the Louisiana Code provides, that "continuous and apparent servitudes may be acquired by title or by a possession of ten years, if the parties be present, and twenty years if absent." A possession or continuation of the servitude claimed in the present instance, is proven to have existed more than ten years before this suit was brought. We are, therefore, of opinion, that the verdict of the jury is supported by the evidence of the case, as no interruption to the possession of this servitude is shown on the part of the plaintiff: for, we do not consider the alteration made in the eave of the roof of the house of the appellee, which had a tendency to lighten the burden of the servitude, as an interruption.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

fering, without complaint, the *drip* from the defendant's house to fall on his lot or grounds for ten years and upwards, is acquired by prescription.

Where the possession or continuation of the servitude of right of *drip* from the eaves of A's house, on the lot of B, is proven to have existed more than ten years, B is barred from bringing his action of damages, or to abate it as a nuisance, against A.

An alteration, within the time allowed to acquire a servitude by prescription, which is made in the eave of the roof of the house of A, and which had a tendency to lighten the burden of the servitude, is *not considered* as an interruption so as to prevent prescription from running.

GREENFIELD *vs.* MANNING AND WIFE, ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE SECOND PRESIDING.

The appellee may ask for an amendment of his judgment, on the day preceding the hearing of the case, or at any time before it is called for trial. The circumstance of the hearing and trial coming on soon afterwards, without opposition, cannot deprive the appellee of his right to the amendment, asked for in due time.

The allowance made by the jury to the defendants, for their improvements, show they were considered as possessors in good faith; and consequently the plaintiff is not entitled to the fruits and revenues of the land.

When on an attentive examination of the evidence, it does not warrant the court to interfere with the verdict, the case will not be remanded.

This is a petitory action, in which the plaintiff, who resides in the State of Mississippi, sues to recover a tract of one thousand and twenty-five arpents of land, lying in the parish of East Baton Rouge, in the possession of one Sarah Roach, since married to the defendant, James Manning. The plaintiff shows that she purchased the land in controversy, of one Jesse Roach, brother of her then husband, Benjamin Roach, by public act passed before the parish judge of East Baton Rouge, dated the 25th March, 1816, with her own money, as she alleges, for the sum of three thousand dollars; she further alleges, that the defendants have been in possession six years, and that the rents are worth three hundred dollars per annum, amounting to eighteen hundred dollars, for which she prays judgment, and for the possession of the land with all its improvements, and that she be declared to have the true title thereto:

The defendants pleaded a general denial, and that the plaintiff's title was fraudulent and simulated, that the vendor had no right to the premises, at the time of the sale; they plead title in themselves, and prescription, being in possession.

In a supplemental answer, the defendants plead lesion, that it was sold by the brother of defendant's wife, for

less than one-half its real value; that they possess the land in good faith, and have made improvements thereon, worth five thousand dollars, which they pray to be allowed, in case of eviction; and that the sale of plaintiff be cancelled as being made in fraud and lesion; and that in case the sale be sustained, they pray to be decreed to be the absolute owners of one-half of the land.

After the issue made up between the original parties, one Charles M'Micken, a citizen of Pennsylvania, intervened and claimed four hundred and ten arpents of the disputed premises, in virtue of a Spanish requette, dated in 1798, and an order of survey, dated New-Orleans, January 2d, 1799, signed by Manuel Gayoso de Lemos, then governor general of Louisiana, and granted to one William Coleman; that Coleman sold to the intervenor by private act, in the state of Mississippi, dated in 1814. He prays to be permitted to intervene, and declared to be the legal owner of said four hundred and ten arpents, and be put in possession thereof.

The defendants pleaded a general denial to the petition in intervention; set up title and possession, and rely upon the prescription of ten years, &c.

Upon these issues the parties went to trial. The jury, after hearing all the evidence, returned the following verdict: "we of the jury, find a verdict for the plaintiff, for one thousand and twenty-five arpents of land; and two thousand dollars to the defendants, for the improvements."

After an unsuccessful attempt to obtain a new trial, the defendants appealed from the judgment, confirming the verdict.

The appeal was granted, February 2d, 1833, returnable to the Supreme Court, sitting at Baton Rouge, the first Monday in August following. The sheriff returned, that he served the citation of appeal on the appellee, the 8th January, 1833, by delivering a copy of the petition and citation of appeal, to the attorney of the appellee, she residing out of the state.

The defendants and appellants failed to bring up the appeal; and now, at the August term, 1834, the appellee filed a transcript of the record of appeal, and insisted on a trial.

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They had previously served a notice, in February, 1834, on the appellants, notifying them that the appeal would be brought up by them.

Lawrence and Morgan, for the plaintiff and appellee, contended, that the appellants having failed to bring up and file in this court, the record of appeal must be considered as having abandoned the appeal, and cannot complain of any part of the judgment, which may be affirmed or modified, at the instance of the appellee. *C. Pr.* 588, 590, 592.

2. The appellee prays, that the judgment decreeing the land in controversy, to belong to the plaintiff, may be affirmed with costs; that the part of the judgment, which awards the value of the improvements to the defendants, be reversed, the evidence showing the defendants were possessors in bad faith. 1 *Martin, N. S.* 405. 8 *Martin, N. S.* 608.

3. The appellee is entitled to fruits from the institution of suit, and the time of making the demand on the defendants. 8 *Martin, N. S.* 608.

A. N. Ogden, contra, suggested that as there was no appeal filed by the appellants, that it must be considered as abandoned by them. That the plaintiff and appellee, can only bring up the record, at the lapse of three days from the return day, and have the judgment affirmed, in order to take out execution. But in this case, more than a year having expired since the return day of the appeal, and the record not having been brought up by the appellants, must be considered as abandoned. There is in fact, no appeal. He also contended, there was no service of citation on the appellee, and he could not voluntarily come into court without it.

Martin, J., delivered the opinion of the court.

This is a petitory action. The defendants are appellants from the judgment, which decrees the land in contest, to belong to the plaintiff. The citation of appeal was served on the latter, who has brought up the transcript of the record, the

defendants and appellants having neglected to file it. He prays for an amendment of the judgment, in that part of it, which allows the defendants the value of their improvements, and asks this court to declare him entitled to the fruits and rents of the land, and that the case may be remanded to ascertain their value.

The defendants contended, that the *prayer* for the amendment of the judgment ought to be disregarded, as it was filed on the day preceding the hearing of the cause, and consequently, not three days before the day fixed for the trial.

The case was not fixed for trial on any particular day. On the first day of the present term, the court informed the bar that it would, on the following day, hear such cases which might be ready to be submitted, and take up, on the next day thereafter, the causes in the order in which they stood on the docket, and so continue through, until all the cases were called and disposed of; which was assented to by the bar.

As the amendment was asked for, at a time when the case was not yet set down for trial on any particular day, the appellee was in time. The circumstance of the hearing and trial of the case, coming on soon afterwards without any opposition, cannot deprive him of his right to the amendment, asked for in due time.

On the merits, the allowance made by the jury to the defendants, for their improvements, show they were considered as possessors in good faith. We have attentively examined the evidence, and it does not appear to us, that any part of it would justify our interference with the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

The appellee may ask for an amendment of his judgment, on the day preceding the hearing of the case, or at any time before it is called for trial. The circumstance of the hearing and trial coming on soon afterwards, without opposition, cannot deprive the appellee of his right to the amendment, asked for in due time.

The allowance made by the jury to the defendants, for their improvements, show they were considered as possessors in good faith; and consequently the plaintiff is not entitled to the fruits and revenues of the land.

When on an attentive examination of the evidence, it does not warrant the court to interfere with the verdict, the case will not be remanded.

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vs.
HIS CREDITORS.

MORGAN *vs.* HIS CREDITORS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

The acceptance of a surrender of property of an insolvent debtor, by the judge, vests all the debtor's rights in the creditors, which cannot be divested or set aside, unless by proceedings of a single creditor, had contradictorily with the mass of the creditors.

Until a syndic is appointed, either by the court or the creditors, no motion or suit to dismiss the petition of the insolvent, can be made or tried.

The plaintiff filed his petition and schedule, on the 11th day of September, 1832, and prayed for a surrender and discharge, under the insolvent laws. He put on his bilan a single credit of ten dollars; placed upwards of six hundred dollars, as debts due by him. The district judge accepted the surrender, and ordered a meeting of the creditors, to take place before the parish judge of East Feliciana. A portion of the creditors waived notice, the others were duly notified to attend the meeting. The parish judge returned that none of the creditors attended, and the district judge ordered the case to be put on the trial docket, at the April term, 1833.

Abner Wamack, one of the creditors of the insolvent, and the principal one, for the sum of five hundred and twenty-five dollars, by his attorney, moved the court to dismiss the petition of the insolvent, on the following grounds:

1. That the order for a surrender was illegally made because the insolvent shows but a single credit of ten dollars, and debts over six hundred dollars; and this applicant is a creditor for upwards of five hundred dollars.

2. That by his own showing, the insolvent has a judgment against this applicant, for two hundred dollars, which he has failed to put on his bilan.

3. There was no legal meeting of the creditors, the same not being advertised according to law, by affixing notices at the usual public places.

The district judge ordered the application to be overruled as coming too late; to which opinion of the court overruling the application, the applicant, by his counsel, excepted. He then appealed.

Lawson, for the insolvent and appellee.

1. The appeal is informally taken, there being no legal defendant in the appeal, the ceding debtor being incompetent to stand in judgment. 4 *Martin, N. S.* 103, 620.

2. The motion came too late, being after the lapse of ten days from the meeting of the creditors, the time allowed by law, to file opposition to the cession on account of nullities, irregularities and frauds. See *Insolvent Act of* 1817, *sec.* 18.

3. The motion was irregular and informal, because no notice was given to the sheriff, who was appointed syndic by the court, the creditors having failed to elect one; and because no rule was taken upon him, to show cause why the proceedings should be dismissed. The appeal is therefore irregular, in this, that the syndic is not made a party, and must be dismissed for want of proper parties. See *Insolvent Act of* 1817, *sec.* 29.

Bradford, for the appellant.

1. The order for a meeting of the creditors of the petitioner, and the acceptance of the surrender by the judge, for the creditors of the petitioner, were illegal. The petitioner has not surrendered any property to his creditors, and without making a surrender of property in value, amounting to more than one-third of his debts, or proving by affidavit, sworn to by two credible, disinterested witnesses, that he experienced the losses by him stated in his petition, the judge could not order a meeting of the creditors of petitioner, or accept of his surrender for the benefit of his creditors. See 2 *Moreau's Digest*, 426, *sec.* 7.

2. The petitioner has a judgment against Wamack, for the sum of two hundred dollars, as will appear by his own showing. For this reason the petition of appellee must

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be dismissed, the petitioner not having surrendered all his estate. See 2 *Moreau's Digest*, 424, *sec.* 1, 3, 5.

3. There was no legal meeting of the creditors, the same not having been called according to law, no advertisement of said meeting having been posted up, as is required by law. 2 *Moreau's Digest*, 426. *Civil Code*, 438, *art.* 4.

4. The judge giving the order for the meeting of the creditors, did not require that the meeting should be held *at the office* of the parish judge, acting as notary, as the law directs. *Civil Code, page* 438, *art.* 4, *2d branch thereof.*

Mathews, J., delivered the opinion of the court.

The proceedings in this case progressed, as far as the permission to the insolvent to surrender his property, acceptance by the judge, to whom the application was made, in pursuance of the provisions of an act of the Legislature, approved on the 29th of March, 1826, an order for a meeting of creditors, and stay of proceedings against the petitioner.

Most of the creditors were regularly cited or waived notice of citation. No meeting took place, and the record does not show that syndics were appointed. While the cause was in this situation, one of the creditors, Abner Wamack, moved the court below to dismiss the plaintiff's petition, on several grounds, stated as the basis of his motion; which was overruled by that court, on the ground that the motion was interposed too late. From this judgment he appealed.

The acceptance of a surrender of property of an insolvent debtor by the judge, vests all the debtor's rights in the creditors, which cannot be divested or set aside unless by proceedings of a single creditor, had contradictorily with the mass of the creditors.

We are of opinion that the District Court did not err, in overruling the appellant's motion. This judgment was perhaps correct, for the reason assigned; but is supportable on another ground, viz: that there were at the time, no proper parties before the court.

Until a syndic is appointed either by the court or the creditors, no motion or suit to dismiss the petition of the insolvent can be made or tried.

The act of 1826, (as we have seen above,) required the judge, to whom the petition and schedule of the insolvent were presented, to accept the property of the ceding debtor, for the benefit of his creditors. This acceptance vested in them all the debtor's rights, and ought not to be set aside, unless by proceedings of one creditor, had contradictorily with the mass of creditors represented by a syndic. It does not,

however, appear from the record, that any syndic has been appointed in the present case, either by the judge who accepted the property, or by the creditors, and until that be done, we are of opinion that a proceeding, such as is attempted by the appellant, is irregular.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed, with costs.

GREENWELL AND WIFE *vs.* ROBERTS ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

Error and want of consideration, in executing a note and mortgage to secure it, are sufficient causes and grounds on which to sustain an injunction against an order of seizure and sale, on such note and mortgage.

An attorney at law, who has obtained a judgment for his client, is not thereby authorised to receive a note and mortgage, in satisfaction of such judgment.

A note and mortgage, executed for the purpose of discharging a certain judgment, and made to the attorney of the plaintiff in the judgment, who shows no special authority to receive them, in discharge thereof, will be declared illegal and null.

The consideration of a note and mortgage, and the fact charged that they were executed in error, may be inquired into, in an injunction to stay an order of seizure and sale; and, if true, this summary proceeding will be declared illegal, and the injunction perpetuated.

This suit commenced by injunction. The plaintiffs allege, that in May, 1830, they gave their note, secured by mortgage on three hundred acres of land, for the sum of six hundred and fifty dollars and fifty-seven cents, payable on the 1st day of February, 1831, to A. Haraldson, for the balance

of a judgment which had been obtained against the plaintiff, Greenwell, by Rutherford, Fiske & M'Neil, of Natchez; Haraldson, the payee of the note, being the attorney of the plaintiffs in said judgment. They further allege, that an order of seizure and sale has issued on said note and mortgage, at the suit of Haraldson, to the use of Stephen Roberts, of the parish of East Baton Rouge, and that the sheriff is proceeding to sell the mortgaged land; and that the only consideration and inducement for which they executed the note and mortgage, was to satisfy and discharge the judgment of Rutherford, Fiske & M'Neil, which still stands open and in full force. They allege, that Haraldson, as the attorney of the plaintiffs in said judgment, had no right to take a note and mortgage to himself, and for his own use, in discharge of said judgment; and they allege, that Greenwell is still liable for the original judgment; and they charge, that said note and mortgage was obtained through fraud, and executed in error. They pray for an injunction against the seizure and sale, and that the note and mortgage may be cancelled; and that the defendants in injunction, be decreed to pay damages and costs.

The defendant Roberts, pleaded the general issue, denied all fraud, and alleged, that at the time of obtaining the injunction, the order of seizure and sale was suspended by the agreement of the parties, in which Greenwell executed a written obligation, to deliver his crop of cotton for the year 1832, to the plaintiffs, in the order of seizure; that the injunction was obtained under the fraudulent pretext for not complying with said obligation, and that in violation of said obligation, the said Greenwell sold and received the proceeds of his cotton and appropriated it to his own use. He prays that the injunction be dissolved, and the plaintiffs and their sureties therein, be decreed to pay the principal debt, with ten per cent. interest thereon, and twenty per cent. damages on the amount thereof, together with a further sum for special damages and costs.

It does not appear that the attorney of the plaintiffs in the original judgment, had any special authority from his clients

to take the note and mortgage in question, and that he gave no discharge to the defendant from the judgment, on receiving the note and mortgage. In the statement of facts, signed by the respective counsel in this case, it is stated, that "the defendants proved by A. Haraldson, that he, as their attorney, had instructions to make any arrangements he could with Greenwell; that he considered the claim as very doubtful, &c., but that he had no special instructions to take a note and transfer the same;" "that he had written authority by letter, and a verbal authority to make any arrangement of the debt, which was for their interest, and that he had always been willing to enter satisfaction on the judgment, &c."

The district judge gave judgment, perpetuating the injunction, reserving to the plaintiffs, in the order of seizure and sale, the right to proceed on their mortgage, whenever satisfaction shall be entered in a legal manner, of the judgment, &c." The defendants, in injunction, appealed.

Saunders, for the plaintiff in injunction.

Andrews, contra.

Mathews, J., delivered the opinion of the Court.

This is a case in which the plaintiffs obtained an injunction to stay proceedings on an order of seizure and sale of certain property, by them mortgaged to one of the defendants. On a hearing of the cause, the injunction was continued until the defendants should release the plaintiffs from a judgment which had been previously obtained against them, at the suit of Rutherford, Fiske & M'Neil, of Natchez, in discharge of which, a note and the mortgage, on which the order of seizure was issued, had been given to the defendant, A. Haraldson. From the judgment perpetuating the injunction as above stated, the defendants appealed.

The grounds on which the injunction was obtained, and those on which it was continued, are want of just consideration, and error in executing the note and hypothecation.

Error and want of consideration in executing a note and mortgage to secure it, are sufficient causes and grounds on which to sustain an injunction against an order of seizure and sale on such note and mortgage.

An attorney at law, who has obtained a judgment for his client, is not thereby authorised to receive a note and mortgage in satisfaction of such judgment.

A note and mortgage executed for the purpose of discharging a certain judgment, and made to the attorney of the

plaintiff in the judgment, who shows no special authority to receive them in discharge thereof, will be declared illegal and null.

The consideration of a note and mortgage and the fact charged that they were executed in error may be inquired into, in an injunction to stay an order of seizure and sale, and if true, this summary proceeding will be declared illegal and the injunction perpetuated.

The evidence shows, that the promise to pay to Haraldson, and mortgage to secure the payment, were made under a belief that he was authorised to take them, and that they would operate a release and discharge of the judgment which Rutherford, Fiske & M'Neil had obtained against the obligors.

No authority is shown on the part of Haraldson, to transact for his clients in the manner in which he has done; no satisfaction was entered on the record in the suit of his clients against the plaintiff, Robert Greenwell; and until he be discharged from the judgment obtained in that case, neither he nor his wife can be legally considered as under any obligation to fulfil their promise to the defendant. And the summary proceeding on the act of mortgage was illegal, the contract which supports it having been made in error, and without a good or valuable consideration given at the time, on the part of the obligee.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

M'MICKEN *vs.* WEEMS, CURATOR, &c.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF WEST FELICIANA.

The reference to the record of a suit, to show that it interrupted prescription, is insufficient to enable the Supreme Court to determine whether prescription was really interrupted.

When the evidence is insufficient to determine the fact of the interruption of prescription, but which can be ascertained, justice requires that the case be remanded for a new trial.

The plaintiff alleges, that a commercial partnership formerly existed between him and one James H. Ficklin, deceased, whose succession is now administered by the defendant, as curator; that said partnership was dissolved in September, 1817, but that no final settlement of the partnership affairs ever took place. He alleges, that the said estate is indebted to him in the sum of five thousand dollars on account of the partnership, and that it owes him four thousand eight hundred and sixty-six dollars and ninety-three cents, with ten per cent. interest from 1819 until paid, being the amount of a note signed by Ficklin, Jed Smith and Amos Webb, on the 20th September, 1817, and by mistake made payable to M'Micken and Ficklin; but which, in fact, was really due to, and intended to be made payable to the petitioner. He prays, that auditors be appointed to settle the concerns of the late firm, and that the defendant, as curator, be compelled to pay the amount of such sum as shall be found due, and the amount of said note.

The defendant pleaded a general denial; and opposed the plea of prescription of one, three and five years to the plaintiff's demand. The latter plea was not filed until after the auditors reported.

The attorney for the absent heirs, pleaded the general issue, and required strict legal proof of the plaintiff's demand, if any he has.

The auditors made a detailed report of the partnership affairs. A rule was taken on the curator and attorney of the absent heirs, to show cause why the report should not be homologated. It was opposed by both, on various grounds. On the trial of these oppositions, and after argument on the merits of the motion, the plea of prescription was filed. The plaintiff referred to a suit, petition and citation, and copy of the note, signed by Smith and wife, and judgment thereon of Charles M'Micken *vs.* Ira Smith and wife, to show that prescription was interrupted, but did not produce the record in the evidence on file; and also a commission and interrogatories of another suit, against Amos Webb, on the same note, to show that such a suit was brought.

WESTERN DIST. *August*, 1834.

M'MICKEN vs. WEEMS ET ALS.

The judge of probates was of opinion, that by the decisions of the Supreme Court, the plea of prescription did not apply in this case, it being in the nature of a suit by a partner against his co-partner for a settlement of accounts; he gave judgment, homologating the award of the arbitrators, allowing the plaintiff the sum of five thousand four hundred and seventy-five dollars and twenty-six cents, including Smith and Webb's note, to be paid by the curator, &c.

Downs, for the plaintiff.

1. The auditors were regularly appointed, and the defendants had due notice thereof. There was no error in the judgment homologating the award. *Code of Practice*, 441 *to* 455.

2. The note of Smith and Webb was ultimately taken into the account, because the arbitrators could not make a settlement without taking it, and connecting it with the accounts taken from the books.

3. At any rate, the court should not entertain the objections to the award made by the attorney for the absent heirs, as it was not necessary to make him a party, in the rule for the homologation of the award; and a non-suit was entered as to him. *Code of Practice*, 122, 177.

4. The plea of prescription, cannot prevail in a suit for the liquidation of partnership accounts. 2 *La. Reports*, 450.

Bradford, for the defendant, made the following points:

1. There was error in homologating the report of the auditors, because it was made up without legal evidence before them.

2. The testimony shows, that all the evidence before the auditors was illegal.

3. The submission to the auditors was, "to examine and report upon the accounts between the plaintiff, and the estate of Ficklin," and no more; but they took upon themselves to settle the account of the partnership, which had been closed before the death of Ficklin, which was not embraced in the submission.

4. Because the said auditors proceeded *ex parte*; the attorney for the absent heirs not being notified of the time and place of meeting, by said auditors as is required by law.

5. Because there was not sufficient legal evidence offered to the auditors; or the court below, showing that the note executed by Ficklin, Smith and Webb, was the sole property of the plaintiff.

Martin, J., delivered the opinion of the court.

The curator is appellant from a judgment against him, rendered on a plea of prescription. The plaintiff urges, that the Court of Probates did not err, as the prescription was interrupted by the commencement of a suit.

The reference to the record of a suit, to show that it interrupted prescription is insufficient to enable the Supreme Court to determine whether prescription was really interrupted.

The suit alluded to by the plaintiff, is indeed referred to in the record of the case under consideration; but, as the transcript of it makes no part of the record before us, we are unable to ascertain, whether the prescription was really interrupted or not; and, on the best consideration we are able to give to the case, it appears to us that justice requires, it should be remanded, in order to afford the plaintiff an opportunity of showing that prescription was interrupted.

When the evidence is insufficient to determine the fact of the interruption of prescription, but which can be ascertained, justice requires that the case be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; and that the cause be remanded for a new trial; the plaintiff and appellee paying costs in this court.

WESTERN DIST. *August*, 1834.

CAMPBELL ET ALS vs. KARR.

CAMPBELL, RICHIE & CO. *vs.* KARR.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A citation of appeal issuing without the seal of the court from whence it issued, is insufficient, and the appeal will be dismissed.

The signature of the clerk to the writ of citation, is incomplete without the seal of the court, which makes it evidence.

Without a sufficient citation in the first instance, the Appellate Court cannot take cognizance of a case, and must dismiss it.

The plaintiff obtained an appeal, returnable to the first Monday in August, 1834, to the Supreme Court, sitting at East Baton Rouge. The order granting the appeal is dated 2d January, 1834, and the citation issued the 15th February following. The writ of citation is signed by the deputy clerk, but *the seal of the court, or any other seal, is not affixed to it.*

Bradford, for the appellee, moved to dismiss the appeal, on the following grounds:

1. Because there is no certificate of the judge at the foot of the record, that it contains all the evidence produced by the parties, nor is there any statement of facts as required by law. *Code of Practice*, 586, 601, 602, 603.

2. There is no legal citation of appeal: the paper purporting to be a citation, has not the seal of the court affixed to it, as required by law.

Downs, for the plaintiff and appellant, contended, that the court in similar cases to the present, and after the return day had passed, allowed an *alias* citation to be taken out in the inferior court, returnable to the next term of the Supreme Court. *Lafon* vs. *Riviere*, 5 *Martin* 500. 6 *Ibid.* 1.

A citation of appeal issuing without the seal of the court from whence it issued is insufficient and the appeal will be dismissed.

2. The act of 1813, under which these decisions were made, is substantially the same as the Code of Practice. *Session Acts* 1813, *p.* 24, §9. *Code of Practice*, 581, 583.

Bullard, J., delivered the opinion of the court.

In this case the appellee moves to dismiss the appeal, on the ground that the citation of appeal does not bear the seal of the court from which it issued. It is true, the Code does not expressly require that the citation of appeal should be sealed; but the court has a seal, and the signature of the clerk is incomplete without it: it is that which authenticates it, and makes it evidence in other courts.

The signature of the clerk to the writ of citation, is incomplete without the seal of the court, which makes it evidence.

We have been urged to allow time to bring up the appeal regularly, and a new citation to be ordered by this court. This, we think, cannot be done. Without citation in the first instance, according to the order allowing the appeal, this court cannot take cognizance of it.

Without a sufficient citation in the first instance, the Appellate Court cannot take cognizance of a case, and must dismiss it.

It is ordered, that the appeal be dismissed.

HEWET & CO. *vs.* WILSON ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where all the facts and circumstances of a case, are placed before a jury of the country, who make up their verdict on all the evidence adduced, with a knowledge of the parties, they are considered much more competent to decide between the parties litigant, than the court, which is bound to respect their verdict, unless clearly erroneous in law, or manifestly contrary to, or without legal evidence.

In a suit by a firm, for the restitution of stolen goods, in damages, where the wife is a party plaintiff, the acts and declarations of her husband, in relation to the matters in contest, in which he took an active part, are admissible in evidence, as forming a part of the *res gesta*. He must be regarded in this case, as representing his wife, with the consent of her partner.

WESTERN DIST. *August*, 1834.

HEWET ET ALS. vs. WILSON ET ALS.

The curator *ad hoc*, appointed at the institution of suit, is not entitled to a fee or an allowance, which is to be taxed in the costs of suit, and paid by the party cast. If he be an attorney, he may claim a fee as for professional services, or be allowed a remuneration for his services, to be paid in either case, by, or out of the funds of, the person whom he represents.

The plaintiffs allege that their store, in the parish of East Feliciana, was broken open and robbed, in the month of June, 1832, of five hundred dollars worth of goods, by a negro man slave, named "Big Sam," belonging to the defendant Wilson, then under the control, and in the charge of one Tuberville, his overseer; and charges the latter with running said slave beyond the limits of the state, and preventing the punishment authorised by law, from being inflicted on him; that they have sustained damages by the abstraction of said goods, to the amount of two hundred and fifty dollars, and defendants have forfeited their right of abandoning said slave, to satisfy said demand, and have become personally liable for the whole amount claimed, for which plaintiffs pray judgment.

The defendants separated in their answers; Wilson by his counsel, pleaded a general denial; denied any amicable demand being made, and relied on the facts and matters set up in the answer of his co-defendant.

Tuberville pleaded a general denial, and that he was only acting as the agent and overseer of Wilson, at the time the alleged theft was committed, and is not responsible therefor; that the plaintiffs charged said slave with the theft, at the time, and one of them was permitted to punish him, until he was satisfied, although the charge proved untrue. He specially denies running said slave off, and that the amount of goods charged to be stolen, is unfounded.

The testimony is somewhat contradictory. Stolen goods, proved to belong to plaintiffs, were found on the negro, which were estimated at something near two hundred and fifty dollars.

At the instance of the plaintiffs, a curator *ad hoc* was appointed to defend Wilson, one of the defendants, who was absent from the state. After verdict and judgment for

the defendants, and an unsuccessful motion for a new trial, the curator *ad hoc* moved the court, to allow him a fee of twenty-five dollars, as a defensor of the absent defendant, The court ordered this sum to be paid, and taxed in the bill of costs, against the plaintiffs. They appealed.

Elam, for the appellants.

The judgment of the District Court should be reversed, as being contrary to law, and the evidence of the case.

2. The plaintiffs having established the amount of goods stolen, to be worth two hundred and fifty dollars, are entitled to judgment for that sum, and their costs.

3. The district judge erred, in decreeing the plaintiff to pay the fee of twenty-five dollars, allowed to the curator *ad hoc*, appointed to defend the absent defendant. *Pontalba* vs. *Pontalba*, 2 *La. Reports*, 466.

4. The attention of the court is particularly solicited, to the allowance made to the curator *ad hoc*, and especially the order, requiring the plaintiffs to pay it.

T. G. Morgan, contra.

Bullard, J., delivered the opinion of the court.

The plaintiffs in this case complain, that their store was broken open by a slave of the defendant, Wilson, and goods, of the value of five hundred dollars, stolen from them; and that the slave was conveyed out of the state by his co-defendant and overseer, so that they were unable to inflict on him the penalty of the law. They sue to recover the value of the stolen goods, and two hundred and fifty dollars damages.

The defendant, Wilson, being an absentee, a curator *ad hoc* was appointed to represent him. Both defendants appeared by attorneys, and severed in their answers. The defendant, Wilson, after an exception to the right of one of the plaintiffs to sue, without showing her husband's authority; which has been waived, pleaded the general issue, and united in the defence made by Tuberville, his co-defendant. The latter pleaded, that the plaintiffs, according to their own

showing, had no right of action against him, as the overseer of his co-defendant. He further, denies the larceny, but avers that, being unwilling to screen the slave charged with the offence from punishment, he offered to surrender him to the civil authorities, or to suffer the plaintiffs to punish him; and that he was punished severely, and the plaintiffs expressed themselves satisfied. He denies having conveyed the negro out of the state, to protect him from prosecution.

Under this state of the pleadings, the case was submitted to a jury, whose verdict was in favor of the defendants, and the plaintiffs appealed.

The evidence shows, that the store has been forcibly entered, and some goods were stolen; but there was no direct and positive proof that the theft was committed by the defendants' slave. Some articles were found in his possession on search, and were restored to the plaintiffs, and the slave was whipped by the husband of one of the plaintiffs, by permission of the overseer. There is no legal evidence before the court, to show that more articles were stolen, than those which are proved to have been restored. The inventory made before the theft, and the one made afterwards, were both *ex parte;* nor do they exhibit specifically any articles. It does not appear whether the difference of two hundred and fifty dollars, between the two amounts, results from a different standard of appraisement, or from a diminished quantity of goods. It appears from the evidence, that the slave remained on the plantation, about six months after the larceny was committed.

Where all the facts and circumstances of a case are placed before a jury of the country, who make up their verdict on all the evidence adduced, with a knowledge of the parties, they are considered much more competent to decide between the parties litigant than the court, which is bound to respect their verdict, unless clearly erroneous in law, or manifestly contrary to, or without legal evidence.

All the facts were before a jury of the country, who, from their knowledge of the parties and witnesses, were much more competent to decide between the parties, than we can be; and, although public policy as well as justice requires, that owners of slaves should be held to make full restitution for offences committed by them, yet we are bound to respect a verdict, unless clearly erroneous in law, or manifestly contrary to, or without legal evidence.

In a suit by a firm for the restitution of stolen

The only question of law presented, for the consideration of the court, arises out of an informal objection to the admission

of evidence, to prove the acts and declarations of the husband of one of the plaintiffs. It is true, he is not shown to be the agent of the firm, but as the husband of one of the partners, it is shown that he took an active part in searching for the stolen property with the consent of the other partner, and inflicted corporal punishment on the slave. The declarations made by him as to the amount lost, correspond with those made by the other partner. As to the declaration that he was satisfied, it referred to the punishment inflicted on the slave. He must be regarded as representing his wife, with the consent of her partners; and his acts and declarations, as forming a part of the *res gesta*.

goods in damages, where the wife is a party plaintiff, the acts and declarations of her husband in relation to the matters in contest, in which he took an active part, are admissible in evidence as forming a part of the *res gesta*. He must be regarded in this case as representing his wife with the consent of her partner.

With this view of the law and evidence, we should affirm the judgment of the court, if it had condemned the plaintiffs to pay merely the ordinary costs of suit. But the court awarded to the curator *ad hoc* of one of the defendants, appointed at the inception of the suit, a fee of twenty-five dollars, and adjudged that it should be paid by the plaintiffs, as a part of the taxed costs. This court decided, in the case of Pontalba *vs.* Pontalba, that a curator *ad hoc* is not entitled to a fee. 2 *La. Reports*, 466. In this respect, the judgment below must be reformed.

The *curator ad hoc* appointed at the institution of suit, is not entitled to a fee or an allowance which is to be taxed in the costs of suit and paid by the party cast. If he be an attorney he may claim a fee as for professional services, or be allowed a remuneration for his services, to be paid in either case, by, or out of the funds of the person whom he represents.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and proceeding to render such judgment on the verdict as ought, in our opinion, to have been given below, it is, further, adjudged and decreed, that the plaintiffs' suit be dismissed, and that they pay the costs of suit, except the curator's fee; and that the appellees pay the costs of the appeal.

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August, 1834.

TUCKER
vs.
LILES.

TUCKER *vs.* LILES.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

Where a contract is entered into, while the party was a *femme covert*, and some act is shown by her, to have taken place after she became a *femme sole*, by which she ratified it, it will be binding on her.

So where the defendant is sued on her note, executed while a *femme covert*, for part of the price of a tract of land, and she retains possession of the land, after her husband died, it will be considered a ratification of the contract, and binding on her.

This action is founded on the following promissory note:

"On the first day of January, 1831, we, or either of us, promise to pay to Henry Tucker or bearer, the sum of four hundred and fifty dollars, for value received, this 26th day of January, 1829." "Thomas C. Black,"

her
"Drucilla ‖ Liles.
mark.

"Witness,"
"Robert Wilson."

The plaintiff is the minor daughter of the payee of the note and sues the defendant Liles alone, by her curator *ad litem* John S. Gayle, and prays judgment against the defendant Liles, for the amount of the note, and interest.

The defendant admits her signature to the note, but says she was a married woman at the time, and was not aware, that she was incapable of contracting; but she now declares, she is not liable in law to pay the note sued on, &c.

The evidence showed, that the defendant was the wife of one Valentine Liles, at the time she signed the note; their marriage was proved by general reputation; and that they lived together as man and wife. It was also in proof, that Liles the husband, died about the 11th February, 1830. This suit was brought, filed the 17th January, 1831.

Both parties gave in evidence, the record of a suit and judgment, on the first of these notes, (being similar to the one sued on, and given for the first instalment of a tract of land,)

on which execution issued, and the land sold to pay the judgment.

The defendant did not plead her coverture to the first note, when sued on it, but let judgment go by default.

The plaintiff relied on a ratification of this contract, by the defendant, after the death of her husband, in making a partial payment, on the first of the notes given for the land; the one in the present suit being for the second instalment. The receipt for the partial payment reads thus: "Received on the within note, two hundred and twenty-five dollars. *January* 19*th*, 1830." But the evidence shows that Liles the husband, died the 11th February, 1830, after the date of this payment.

The Jury returned a verdict for the plaintiff, for the whole amount of the note, with interest, upon which judgment was rendered accordingly. After an unsuccessful motion for a new trial, the defendant appealed.

An opinion was pronounced in this case, at the August term, 1832, in which the judgment of the District Court was affirmed. *See the opinion printed in* 4 *La. Reports*, 328.

This case was argued at the August term, 1832, at Baton Rouge, by *Mr. Saunders* for the plaintiff, and *Mr. Andrews* for the defendant.

Mr. Andrews, of counsel for the defendant and appellant, applied for a re-hearing.

1. That the court has fallen into an error, in deciding that although plaintiff was a *femme covert* when she signed the note, she ratified the contract, by making a partial payment after she became a *femme sole*. The testimony shows, and so the fact is, that the husband died, the 11th February, 1830, and the partial payment was made the 19th January, 1830, preceding his death, and while she was yet a *femme covert*.

2. The partial payment was not made on the note in the present suit.

WESTERN DIST. *August*, 1834.

STATE *vs.* HAY ET ALS.

Where a contract is entered into while the party was a *femme covert* and some act is shown by her to have taken place after she became a *femme sole* by which she ratified it, it will be binding on her.

So where the defendant is sued on her note, executed while a *femme covert*, for part of the price of a tract of land, and she retains possession of the land after her husband died, it will be considered a ratification of the contract and binding on her.

On examination of the record pending the application for a re-hearing, it appeared the record and judgment on the note, given for the first instalment of the price of the land, for which the note now in suit was also given, was in evidence, which showed, that the defendant and appellant, remained in the *possession of the land, after the death* of her husband. This fact is considered as a ratification of the contract, for which the note sued on was given, after she became a *femme sole.*

Martin J., delivered the opinion of the court at this term, (August, 1834,) on the re-hearing. At the request of the appellant, a re-examination of this case, has taken place; but it has resulted in the conviction, that our former judgment is not incorrect. It appears from a re-examination of the evidence, that the appellant retained possession of the land, after the death of her husband, and thereby ratified the contract, on which the note is given, after she became a *femme sole.*

It is, therefore, ordered, adjudged and decreed, that the *judgment* formerly rendered in this case, remain the unaltered judgment of the court, as if no re-hearing had ever been granted.

STATE *vs.* HAY ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

Forfeited penalties are recovered on motion, without the formality of any pleading.

Where a surrender is made of the accused into the custody of the law, even after forfeiture has been entered, and the state avails itself of it by trying the criminal, the bail are entitled to be discharged.

When the principal is tried and acquitted, before judgment for the recovery of the forfeited penalty on failure to appear at the first term, the bail will be discharged.

The district attorney for the Third Judicial District, gave a written notice, before the commencement of the April term, 1832, of the court, to be holden in the parish of East Feliciana, to the defendants, who were sureties in a recognizance, or bail-bond, for the appearance of one Nancy Hendrix at court, charged with a crime, that he should move for judgment against them, on the ground that the condition of the bond was broken, by the failure of the principal to appear at court, at the time mentioned therein.

The recognizance is dated 29th July, 1831, and conditioned that "the said Nancy Hendrix shall appear at *court*, on the first Monday of November following, and if it shall not be held, then on the first day on which it will be held, &c., then the above bond to be null," &c.

At the November term, 1831, an order was entered, declaring the recognizance forfeited, for the non-appearance of the principal therein; and the sureties being called, and requested to produce the body of their principal in court, and having failed, it was ordered that their recognizance be forfeited.

The sureties showed, that at the next term they moved the court, and obtained leave, to surrender their principal into custody, which they did accordingly, and were discharged by order of the court. The accused was tried, and acquitted. The district judge, in granting the discharge, observed, that "at the succeeding term from that of the forfeiture of the recognizance, the court continued the cause for leave to the bail to produce the body of the principal in court at the next term. The next court adjourned on the second day of its session, and during the present term the bail have produced the principal, and surrendered her into open court in the custody of the law. It is not necessary to inquire whether bail can be discharged by a surrender of their principal, after the recognizance has been regularly forfeited; for, the order made at the April term, 1832, granting the bail further time to comply with the conditions of their bond, operates as a

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rescission of the previous order of forfeiture. The case, therefore, stands as if no forfeiture had been decreed. The principal, therefore, being now in custody, the court considers that the bail ought to be discharged."

The defendants pleaded the discharge, and had judgment accordingly.

Brunot, for the state.

1. The record shows, that the bond was regularly forfeited by the non-appearance of the principal. The state, then, acquired a right to the penalty, which could not be divested except by its consent. 4 *Black. Commentaries*, 253.

2. There is but one mode pointed out by law in this state, in which the court can pronounce on a bond forfeited, and which prescribes the *duty* of the court in pronouncing judgment upon the motion of the district attorney. 1 *Moreau's Digest*, 386.

3. The record of the court *a qua* shows a forfeiture of the bond. The securities, then, could only on the motion of the district attorney discharge themselves, by proving that before the forfeiture their principal had died, or other sufficient cause.

Ripley and *Lawson*, for the defendants.

1. The proceedings on the forfeiture of a recognizance must be had according to the ordinary forms of practice.

2. When the appellees were regularly called, and failed to produce the prisoner, the state should have taken a default against them, which, after the legal delay and proper showing, would have matured into a final judgment. 1 *Moreau's Digest*, 369, 386.

3. The judgment of forfeiture should have been signed by the judge, to make it valid.

Martin, J., delivered the opinion of the court.

The state is appellant from a judgment which rejects its claim to the penalty of a recognizance, for the appearance of a person charged with an indictable offence.

The record shows, the accused and her bail were called, and did not appear; that the court extended the time for bringing the body of the defendant, till the first day of the ensuing term; that during that time, the principal was surrendered, tried and acquitted.

Errors in the rendition of the judgment are assigned, as follows:

1. The surrender was made after the expiration of the time allowed at common law, to the bail, to claim an *exoneratur*.

2. During the pending of the proceedings, by notice on the part of the state, for the recovery of the penalty, and after the *contestatio litis* was formed, the court was without authority to entertain a motion to discharge the bail.

3. The bail was discharged on motion, and without issue joined, while the state, having acquired a right to the penalty, was entitled to all the advantages of a party litigant in a court of justice.

Forfeited penalties are recovered on motion without the formality of any pleading.

4. After a forfeiture has been duly entered, it cannot be set aside in any other manner, than according to the act of 1818.

5. Admitting that the court had the right of extending the time for the surrender of the principal, the bail could not avail themselves of the extension after the period was expired.

Where a surrender is made of the accused into the custody of the law, even after forfeiture has been entered, and the state avails itself of it by trying the criminal, the bail are entitled to be discharged.

When the principal is tried and acquitted before judgment for the recovery of the forfeited penalty, on failure to appear at the first term, the bail will be discharged.

It has appeared to us, the District Court did not err. Forfeited penalties are recovered on motion, without the formality of any pleading. The surrender of the accused having been made, the state having availed itself of it by trying the defendant, who was acquitted, and this being shown before judgment was awarded for the state, the bail were entitled to their discharge.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed.

INGRAM *vs.* CROFT.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT.

The party who demands a new trial, on the ground of newly discovered evidence, since the trial, must show, not only due diligence before, but that the evidence is competent and material.

So an affidavit, setting forth, that certain depositions taken in another suit, to which the plaintiff was a party, but not between the same parties, is insufficient to obtain a new trial, on the ground of newly discovered evidence.

Where a witness swears from *his impressions*, that a fact was so and so, it is insufficient, and the testimony should be rejected.

The plea of the general issue, and the plea of prescription, are not inconsistent with each other.

The possession of a joint note, by one of the drawers, with a receipt of payment by the holder or possessor endorsed on it, by the person entitled to receive it, is *primâ facie* evidence of the liability of the other drawer, to refund one-half of the note.

The plaintiff alleges, the defendant is indebted to him, in the sum of two thousand four hundred and fifty dollars, with interest thereon, at the rate of nine per cent. per annum, from the 20th day of April, 1826, until paid. He charges, that the defendant became so indebted, in pursuance of an agreement between them, to take up a note of one James A. Kirkland, which had been discounted in the branch bank of Louisiana, at St. Francisville, upon which four thousand, nine hundred dollars was due, in which each of them were to pay one-half thereof. He alleges, that on the 20th April, 1826, he paid and took up said note, and that the defendant, in pursuance of said agreement between them, and with the drawer, (Kirkland,) became responsible to him for the one-half, amounting to two thousand, four hundred and fifty dollars.

The defendant pleaded a general denial to the plaintiff's demand, and prescription.

The plaintiff offered in evidence, the note of Kirkland, mentioned in the petition, which had on it the cashier's receipt and certificate endorsed, that it was only for four thousand nine hundred dollars, and that the plaintiff paid it with his check, dated April 20th, 1826. He then offered several notes and drafts in evidence, signed by himself and the defendant, and endorsed by the latter, which had been discounted at different times, to raise the money to take up Kirkland's note, and which notes he had paid off, as appeared by receipts endorsed thereon, to him.

The testimony failed to connect the notes offered in evidence, with the agreement, alleged by the plaintiff to have been entered into by the defendant, to pay half the note of four thousand nine hundred dollars of Kirkland, which was proved to have been taken up in bank, by the check of Ingram.

Several of the notes offered in evidence, were objected to, and bills of exception taken to their admission, on the ground of irrelevancy, and that they were *res enter alios acta.*

The jury returned a verdict "*for the defendant;*" upon which judgment was rendered accordingly, after an unsuccessful effort to obtain a new trial, mainly on the ground of newly discovered evidence, since the trial. The plaintiff appealed.

Lawson, for the plaintiff.

Andrews, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff and appellant relies, for a reversal of the judgment of the District Court, on various grounds, which we proceed to notice in the order in which they are presented.

I. That the court refused to grant a new trial, which was asked on the ground of newly discovered evidence.

In his motion for a new trial, the plaintiff set forth, as one of the grounds, that he had discovered, since the trial, that the answers of Cash, Collins and Browden, and John

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Stirling, whose depositions were taken by the defendant in the case of himself *vs.* Kirkland and Lee Hardesty, syndic, will prove and establish the joint undertaking, and equal liability of plaintiff and defendant for Kirkland to the bank. The affidavit in support of his motion, in reference to the above ground, sets forth, that the affiant has good reason to believe that the facts are true and correct, and that those facts were unknown to him, although he had used every effort and diligence in his power, to procure the necessary testimony; and, in support of his affidavit, he annexes, as a part of it, the affidavit of William Stewart, one of the witnesses, taken in the case above referred to; and in reference to the second ground, he refers to the record in the same case.

The party who demands a new trial on the ground of newly discovered evidence since the trial, must show, not only due diligence before, but that the evidence is competent and material.

The party who demands a new trial, on account of new evidence discovered since the trial, must show, not only due diligence before, but that the evidence is competent and material. Admitting that the affidavit in this case, is sufficient as to diligence, it sets forth, the new evidence to be offered on a second trial, to be certain depositions of witnesses taken in a case in which the present defendant was plaintiff, but not between the same parties. It is clear, that those depositions could not be read in evidence on the new trial, because they are, as to this defendant, *ex parte*. It would be quite nugatory to grant a new trial, in order to let in new evidence, which, according to the affidavit itself, would be inadmissible. We cannot look at the depositions to ascertain what effect the statements of the witnesses would probably have, but the party must be confined to his affidavit. But it is said, that if the depositions are not legal evidence, the witnesses may be sworn on the new trial. The affiant does not allege that the witnesses are material, and that he had used due diligence; nor are we informed whether their attendance could be procured. The party is presumed to have set forth his whole ground, and to have sworn to as much as his conscience would permit. Having confined himself to the affidavits or depositions of the witnesses, on file in another case, we can look only at those depositions to ascertain, whether they are material and competent. The

So an affidavit, setting forth that certain depositions, taken in another suit, to which the plaintiff was a party, but not between the same parties, is insufficient to obtain a new trial, on the ground of newly discovered evidence.

record is annexed to the affidavit, but merely to exhibit in *extenso* the depositions in question, and the affiant does not allege that the record itself is the evidence which he has discovered, but the depositions of the witnesses contained in it.

Where a witness swears from *his impressions*, that a fact was so and so, it is insufficient, and the testimony should be rejected.

II. The appellant further relies on a bill of exception, taken to the ruling of the district judge, in rejecting certain statements of a witness as to his impressions. The witness had been called on by plaintiff to write a note, which was afterwards signed by both parties. He says: "The impression was made on his mind, that the money was borrowed to take up a note in bank, given by Ingram and Croft, in relation to J. A. Kirkland; but whether he received this impression from plaintiff when he asked him to draw the note, or from conversations between plaintiff and defendant, in his presence, he cannot say." We think, the court did not err in rejecting these statements. Facts alone are to go to the jury, except in certain cases, the opinions of persons skilled in certain trades or professions. The impressions of a witness are nothing more, than the hasty conclusions drawn by his own mind, from certain facts, falling under his observation. The jury must have evidence of the facts, in order to ascertain what impression they will make on their minds. Parties are not to be tried by the witnesses, but by the jury.

The plea of the general issue and the plea of prescription, are not inconsistent with each other.

III. It is further contended, that the judge ought to have charged the jury, that the plea of prescription, is a waiving the general issue, and admitted the facts as alleged. We are of opinion, that the two pleas are not inconsistent with each other. The general denial, puts at issue the right of the party to recover; and the plea of prescription is founded, not exclusively on a presumed release and payment, but in some measure, from public policy, upon the negligence of the party to prosecute his right: ***Interest reipublicæ ut finis sit litium.*** The plea, therefore, of the general denial, and the plea of prescription may, in our opinion, well stand together.

On the merits, it appears, that the plaintiff's right of action is founded on the alleged promise of the defendant, to be jointly bound with him to discharge a debt due by Kirkland,

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to the Bank of Louisiana, which, he avers, was paid entirely by himself, and he demands of the defendant one-half, according to the agreement.

Among other circumstances going to support his pretensions, he alleges, that the parties gave their joint note in favor of Kirkland, for two thousand dollars, dated April 28th, 1826, at nine months after date, and payable at the counting-house of Dicks, Booker & Co., which he annexes to his petition. This note appears to have been endorsed by the payee, and is receipted on the back by Dicks, Booker & Co., as having been paid by Charles Ingram. As a proof of the transaction itself, we think the possession of the note by Ingram, with the receipt of the holder or endorsee, sufficient to show *primâ facie* the liability of Croft to refund one-half of the amount of that note. If the plaintiff had made that note the basis of his action, we do not find any evidence in the record to repel the demand for one thousand dollars. The signature of Dicks, Booker & Co. was proved on the trial. If they had been sworn as witnesses, they could not have been permitted to contradict their own act. But the plaintiff does not sue on that note as a single transaction, but sets it forth merely as evidence, to show a contract to refund a larger sum, a part of which was paid by means of this note. It was, therefore, before the jury as a circumstance, from which they were asked by the plaintiff to infer, that the defendant had promised to refund to him, not one-half of that note, but one-half of the five thousand dollars, paid by him in bank. We find no evidence in the record, which connects the two transactions. The tenor of that note, together with the joint affidavit of the parties before the notary, at the meeting of the creditors of Kirkland, certainly furnish some presumption that there was an understanding and agreement between the parties, as alleged in the petition. But it was a question of fact, submitted to the jury, and parties are bound to do something more than render their case probable. In reviewing the verdicts of juries, we have uniformly acted on the principle, not to disturb a verdict, unless clearly contrary to law and evidence. In this case, the engagement of the defendant to

The possession of a joint note by one of the drawers, with a receipt of payment by the holder or possessor endorsed on it, by the person entitled to receive it, is *primâ facie* evidence of the liability of the other drawer, to refund one-half of the note.

refund one-half of the debt paid in bank, is not so clearly made out as to authorise us to set aside the verdict. But, at the same time, justice, in our opinion, requires that the judgment should be so expressed, as not to bar the plaintiff's right in a separate suit, to demand one-half of the amount paid by him to Dicks, Booker & Co., in discharge of the joint note of the parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; reserving, however, to the plaintiff his right, if any he have, to claim of the defendant the reimbursement of one-half of their joint note of the 8th of April, 1826.

LILES *vs.* RHODES.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING

Where the conduct of a bidder and purchaser at sheriff's sale, is of such a character as to prevent competition in bidding, and deprive the owner of a higher price for his property than would otherwise have been obtained, the owner may have the sale annulled, and such damages awarded as a jury may assess to be reasonably sustained.

Where the sale made by a sheriff is rescinded on account of the improper and illegal conduct of the buyer at the time of sale, the owner must refund the price which was paid.

But where the owner of land, sold at sheriff's sale, obtains a rescission of the sale with damages against the purchaser, the latter may go in compensation of the *price* which is to be refunded to the purchaser.

The plaintiff alleges, she purchased a tract of land with one T. C. Black, for one thousand eight hundred dollars,

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payable in four annual instalments of four hundred and fifty dollars each, for which they gave their joint and several notes. When the first note became due, in 1830, she paid her half thereof, (two hundred and twenty-five dollars,) but Black failing to pay his, judgment was obtained, and execution levied on the land. The plaintiff alleges, the defendant (who is her son-in-law,) promised and pretended to act as her agent, when the land seized, was to be sold, and to buy it in; that he appeared at the sale, and so gave it out to the by-standers, but that when the sale came on, he acted in fraud, and falsely pretended to bid it in, prevented others from bidding the value of the land, and bid it in for himself, at a very reduced price. That in order to carry on his fraud and misrepresentation, he bid off the land in her name, for twenty-eight dollars less than a fourth of its value, and the sheriff made his return on the execution, that he had sold the land to the plaintiff, and a twelve months bond prepared, for her to sign as principal, and by defendant as her surety; that defendant, the better to carry on his deception, told the sheriff that plaintiff refused to sign the bond, and procured another to be made out, and signed by himself, as purchaser; that defendant turned her out of possession, forcibly, in virtue of this pretended sale and purchase by him, and retains and claims the land as his own. She alleges, that this pretended sale is a nullity, for the causes stated, and others that will appear; and that there was no legal advertisement of sale, and no written notice of seizure, as the law requires; no adjudication of the property was made to defendant, it being actually made to the plaintiff, but owing to defendant's fraud and misrepresentation, he obtained the sale to himself, at less than one-fourth part of its value; she further alleges, that defendant, by a similar fraud, has obtained the possession of nine slaves, one of whom died in his possession, and has retained possession thereof, from 3d May, 1831, until December, 1832. That their services are worth one thousand dollars; and that she has sustained two thousand four hundred dollars in damages, &c. She prays judgment for the delivery to her of the land, and that the sale thereof, be

cancelled and annulled, and that she have judgment for one thousand dollars, the price of the hire of her slaves, and damages.

The defendant pleaded a general denial.

The evidence of the plaintiff showed the facts, which she alleged to be in substance as set forth by her. The jury returned a verdict in her favor, annulling the sale, and restoring to her the land in question, and two hundred dollars in damages; from judgment rendered thereon, the defendant appealed.

Andrews, for the plaintiff.

1. It is objected, that the plaintiff shows no title. She sets up an absolute title to the land, and the defendant claims it under her title, bought at sheriff's sale, and cannot attack it. 2 *La. Reports*, 209.

2. The judgment of the court is *not* for more than is claimed; it annuls the sale, restores the land, and decrees damages for its illegal detention, &c., which is all we ask. The laws give us possession, when the land is decreed to belong to the plaintiff, even if the verdict had been silent in that matter. *C. Pr.* 628, 630, 631, 632, 633.

3. The amount of damages recovered, are proved, and are partly in lieu of rents.

Saunders, contra.

1. The plaintiff has shown no title to the land, the sale of which is sought to be rescinded.

2. The judgment of the court is for more than is demanded in the petition, as given by the verdict of the jury. He prays for a rescission of the sale and damages; the judgment rescinds the sale, gives damages, and *decrees the land* to be the property of the plaintiff, and orders a writ of possession.

3. The amount of damages is contrary to law, and the evidence of the case.

4. The judgment and verdict are, therefore, contrary to law, and ought to be reversed.

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Mathews, J., delivered the opinion of the court.

This suit is brought to annul a sale of a certain tract of land, which was sold by the sheriff of East Feliciana, to satisfy a judgment, which had been obtained against the plaintiff, at the suit of Sarah Tucker, and also to recover damages, and the price of certain slaves, alleged to be the property of the plaintiff.

The cause was tried by a jury in the court below, who found a verdict for the plaintiff, and assessed her damages at two hundred dollars. On this verdict, the court decreed the sheriff's deed to be cancelled and annulled, ordered the plaintiff to be put in possession of the land in dispute, and the recovery of the damages assessed, &c. From this judgment the defendant appealed.

The evidence of the case shows, that the land now in contest, was seized under an execution, which issued on the judgment obtained by Tucker vs. Liles, (as above stated,) that on the first exposure to sale, it did not produce in cash, the sum required by law, and that it was afterwards offered for sale at a credit of twelve months, when Rhodes the defendant bid for it. Previous to bidding, he declared to several persons, that he intended to bid for the defendant in execution. This information he communicated to a certain person, who appeared as a witness in the present suit, and testifies that his intention was to bid, and would have given more for the property, than the sum for which it was struck off to Rhodes, except for his belief, that the latter was really bidding for Liles, on whom he did not wish to enhance its value, as she was the defendant in execution, and owner. The sheriff was also told by the defendant, that he bid as agent for the present plaintiff: and it appears by his return on the execution, that it was adjudicated to her. She however refused to give the bond required by law, in cases of sheriffs' sales on a credit; and the officer conveyed the land to the defendant, who executed his bond to secure the price of adjudication, obtained possession of the property adjudicated, and finally paid the price.

LILES vs. RHODES.

Where the conduct of a bidder and purchaser at sheriff's sale, is of such a character as to prevent competition in bidding, and deprive the owner of a higher price for his property than would otherwise have been obtained, the owner may have the sale annulled and such damages awarded as a jury may assess to be reasonably sustained.

Where the sale made by a sheriff is rescinded, on account of the improper and illegal conduct of the buyer at the time of sale, the owner must refund the price which was paid.

But where the owner of land, sold at sheriff's sale, obtains a rescission of the sale with damages against the purchaser, the latter may go in compensation of the *price* which is to be refunded to the purchaser.

There are certainly irregularities in the proceedings of the sheriff, as above stated. Whether these irregularities would, without the additional circumstances disclosed, afford good grounds to annul the sale, is a question which we deem it unnecessary to settle on the present occasion. The conduct of the defendant, whether the motives which led him to act as he did, were honest or fraudulent, certainly caused great prejudice to the plaintiff, by preventing other bidders from giving a greater price for her property, then about to be disposed of, according to the rigor and formalities of law.

We conclude, that there is no error in the verdict and judgment of the court below. It would, however, produce injustice to the defendant, to allow the plaintiff to obtain possession of the land, without refunding to him the price actually by him paid for it, and which was appropriated to the extinguishment of the plaintiff's debt. The sum paid, appears to be two hundred and ninety-seven dollars, ninety-four cents. The payment was made on the 14th of November, 1831. Now, as the sale is rescinded, the defendant must recover this amount with legal interest. The judgment which annuls the sheriff's sale, and orders restoration of the property, seems to have been pronounced about the 20th of April, 1833. The interest which had accrued at this time, is nineteen dollars, eighty-five cents, making an aggregate of three hundred and seventeen dollars, seventy-nine cents. The two hundred dollars damages, assessed to the plaintiff in the present suit, ought to be allowed in compensation of the amount due to the defendant, which leaves a balance of one hundred and seventeen dollars, seventy-nine cents.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed; and it is further ordered, adjudged and decreed, that no execution or writ of possession shall issue in this case, until the plaintiff and appellee, shall have paid to the defendant and appellant, the sum of one hundred and seventeen dollars, seventy-nine cents, or shall deposit this amount with the clerk of the

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District Court, for the parish of East Feliciana, and for the use of the defendant. It is further ordered, that the appellant pay the costs of this appeal.

WILLIAMS *vs.* BETHANY.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT.

A peremptory exception may be pleaded, after the cause has been remanded for a new trial.

According to the 420th Article of the Code of Practice, an amendment of the answer after *issue joined*, may be made by adding new exceptions, provided they be not of the dilatory kind.

So in an action for the recovery of rent, on the lessee's holding over, after the case has been remanded, he may oppose the exception, that after the expiration of the lease, he tendered the possession of the premises.

A new trial will not be granted on the allegation that the verdict is contrary to law and evidence, when on an examination of the evidence, it does *not* appear the jury were clearly wrong.

This is an action founded on a written obligation of the defendant, to pay the plaintiff three hundred dollars, for the rent of two plantations, for one year, ending in January, 1829, in which the obligor bound himself "to take the most particular care of all the improvements, and return the rented premises under a good and lawful fence."

The plaintiff charges the defendant with holding over, and not paying the rent for the year, ending in January, 1829, and doing great damage to the premises, for which he claims three hundred dollars, the price of his rent, and ten thousand dollars in damages, for the injuries, dilapidations, &c., caused by his misconduct to the lands and improvements.

The defendant admitted his signature to the instrument sued on, but pleaded a general denial, and negatived every other allegation in the petition.

He next interposed the plea of *res judicata* to all that part of the plaintiff's demand, which charges him with damages for the ruinous and dilapidated state of the premises, &c.; that all these matters have been adjudged, in a former suit between the parties.

In an amended answer, the defendant averred, he had delivered up the premises, at the end of the year, which were received by the plaintiff. This amendment was objected to by the plaintiff's counsel, but overruled and admitted.

Upon these pleadings, the parties went to trial.

The plaintiff's attorney offered in evidence, the testimony of Vincent Vaughan, residing in the state of Alabama, and Mrs. R. Cooney, of the parish of East Feliciana, which testimony had been taken down by the clerk, on the trial of another suit between the same parties, for the first year's rent, and damages done to the leased premises, which suit and judgment therein, was unappealed from; the defendant's counsel objected to the reading of this testimony, because it was not the best of which the nature of the case admitted; that the testimony of these witnesses, taken in the present suit, would be better than that in the former, &c. The court overruled the objections, admitted the testimony, and a bill of exceptions was taken to the decision.

The defendant then offered in evidence, the record of the suit and judgment, for the first year's rent, and one hundred and fifty dollars in damages, for injuries and damages, which was pleaded as *res judicata.*

The cause was submitted to a jury, on the evidence adduced by the parties, who found a verdict for the defendant; from the judgment rendered thereon, after an unsuccessful attempt for a new trial, the plaintiff appealed.

[This case was formerly before this court, at the May term, 1830, in the Eastern District. See 1 *La. Reports*, 315.]

Turner, for the plaintiff.

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1. The objection made, to the defendant's amended answer, averring delivery of the premises, at the end of the first year, ought to have been sustained, as the amendment changed the issue, &c.

2. The motion for a new trial, was improperly overruled.

3. The plaintiff is entitled to a judgment, upon the evidence adduced in the cause, for the rent of the premises, held over by defendant, and to damages; the testimony fully and clearly establishes the allegations in the petition.

Andrews, contra.

Bullard, J., delivered the opinion of the court.

This case was before the court, on appeal, at a former term. 1. *La. Reports*, 315. The judgment in favor of the defendant was then reversed, and the cause, remanded for a new trial. One of the points then made by the plaintiff's counsel was, that evidence to prove an offer, to surrender the rented land to the proprietor, was inadmissible, unless such offer was pleaded. In this position he was sustained by this court.

A peremptory exception may be pleaded after the cause has been remanded for a new trial.

On the day fixed for the new trial, in the District Court, the defendant obtained leave to amend his answer, and, in his amended answer, sets up the exception, that after the expiration of the lease, he tendered possession of the premises to the plaintiff, and that he received the place, and retained possession by himself or his tenants. The filing of this exception was opposed by the plaintiff's counsel, on the grounds, 1st, that it came too late, and 2dly, that it changed the issue between the parties. A bill of exceptions was taken, and is now relied on as one of the grounds for reversing the judgment, rendered on the second trial. The exception was in our opinion peremptory, and might well be pleaded at that stage of the proceedings. The 420th article of the Code of Practice, authorises an amendment of the answer after issue joined, by adding new exceptions, provided they be not of the dilatory kind. This is certainly not a dilatory exception. It goes to extinguish the action of the

According to article 420 of the Code of Practice an amendment of the answer after *issue joined* may be made by adding new exceptions, provided they be not of the dilatory kind.

So in an action for the recovery of rent on the lessee's holding over, after the case has been remanded, he may oppose the exception that after the expiration of the lease, he tendered the possession of the premises.

plaintiff. If the other party was taken by surprise, it would have justified a further delay, in procuring evidence to rebut, but he chose not to ask that indulgence, but went into trial.

The appellant contends, that a new trial should have been granted, on the grounds stated by him in his motion, for that purpose; that the verdict was clearly contrary to law and evidence. On an examination of the evidence, which comes up in the record, we are not enabled to say, that the jury was so clearly wrong, as to authorise us to disturb the verdict.

A new trial will not be granted on the allegation that the verdict is contrary to law and evidence, when on an examination of the evidence, it does *not* appear the jury were clearly wrong.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BELL *vs.* NORWOOD, ADMINISTRATOR, &c.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF EAST FELICIANA.

In an action on an account current, founded on a long course of commercial transactions between the parties, in which payments are charged for sums paid to take up drafts accepted by the plaintiff, the possession of the draft by the acceptor, is *primâ facie* evidence of the payments charged in the account, and may be given in evidence in support of such items in the general account.

The rule, that an acceptor of a bill is bound to show, not only the drawing and acceptance of the bill and its payment, but that it was put in circulation after acceptance, and that the drawer had no funds in his hands, applies only to cases where the acceptor declares upon a bill of exchange against the drawer.

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Where drafts are charged in an account current as paid to *Guay*, and those offered in evidence are payable to *Gray*, if the amounts and dates of the drafts correspond with those charged in the account, they will be received in evidence.

A letter of guarantee must be construed strictly to charge the guarantor: so where A recommended B to the credit of C, and the latter made the advance to B and D, as a firm, on the faith of the guarantee: *Held* that the guarantor is not bound thereby.

The testimony of one witness to a signature, who swears he saw the party sign, and whose credibility is not impeached, will not be *invalidated* by the negative statements on oath of two witnesses, made on a comparison of handwriting of the party, and his signature to documents on file in the suit.

Where the amount of a debt, or an agreement to pay money, exceeds the sum of five hundred dollars, the testimony of one witness alone is insufficient to prove such debt or demand.

Accounts and letters relative to sales made by the plaintiff, and rendered to the defendant anterior to the date of the first item of the account sued no, are admissible in evidence, because it may also be shown that a subsequent settlement took place, and the moneys arising from such sales were accounted for.

The re-possession of a note once specially endorsed by the payee, is not evidence of title to it, but that it is, if the transfer is made in blank.

Parole evidence, to prove an agreement to pay interest at ten per cent., is clearly illegal and inadmissible.

This is an action to recover the balance of a mercantile account by the plaintiff, who was a commission merchant in New-Orleans, against the defendant, as administrator of the succession of Abel T. Norwood, deceased, in which the former claims a balance of five thousand four hundred and seventy-one dollars and thirty-one cents, for moneys advanced, services rendered as commission merchant, for cash paid on acceptances, commissions, guarantees, cash laid out and expended for the use of the deceased, for goods, wares and merchandise furnished him at sundry times, between the

2d day of June, 1831, and 24th day of June, 1832, according to the general account current annexed.

The plaintiff specially charges as items in said account: That the said Norwood, deceased, executed his note on the 21st December, 1831, payable twelve months after date, at the counting-house of plaintiff, in New-Orleans, for three thousand dollars, which was duly protested for non-payment; and on the 15th May, 1832, the deceased executed another note, payable four months after date, for one thousand four hundred dollars, at New-Orleans, also protested, &c.; that at the special instance and request of the deceased, and under his guarantee, he accepted and paid two drafts of Messrs. Hardesty & Neill, one for two hundred and twenty-three dollars and eighty-six cents, the other for eight hundred and forty-three dollars and fifty-three cents, which, with interest and commissions amounts to the sum of one thousand and ninety-six dollars and seventy-nine cents, and which the estate of the deceased is liable for. He prays judgment for the said sum as exhibited to be due by the account rendered, of five thousand four hundred and seventy-one dollars and thirty-one cents, with interest and costs.

The administrator pleaded a general denial, and put the plaintiff on the proof of every item and allegation in the petition and account.

Harvey, witness for plaintiff, states that he examined the account sued on, item by item, and finds it correct; that the balance charged to be due, is really due; that the note of one thousand four hundred dollars in said account was signed by the deceased in witness's presence; that the plaintiff endorsed the other notes, and paid them; and he believes they were given to enable Norwood to raise money on them. The notes and drafts mentioned in the account, were then produced, and their signatures proved. The two drafts of Hardesty & Neill were contested, on the ground that the deceased had never been notified that the plaintiff had accepted his recommendation to advance them credit or

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money; and that his undertaking was not complete. The letter of credit is as follows:

"Mr. Saml. C. Bell."

"Sir: Any thing you can do for the bearer, Maj. S. W. Neill, whom I hereby introduce as my friend, will be done for me, he being a merchant in Clinton."

"I am, &c."

"A. T. Norwood."

"P. S. If you should accept for Mr. Neill for $1000, I will be bound by this note." "I am, &c."

"A. T. Norwood."

The parties introduced documentary evidence on both sides, to show the state of the respective accounts of the plaintiff and the deceased, and after an examination of all the evidence submitted, the probate judge found a balance of four hundred and three dollars and seventy-one cents due to the estate of the deceased, for which judgment was given. The plaintiff appealed.

It appeared from the account current sued on, that the first item was stated as follows: "1831, June 3. To balance as per account due this day, $743 81." This item was supported by the testimony of a single witness. The defendant opposed its being allowed, on the ground that the testimony of one witness was insufficient to establish a demand or debt over five hundred dollars. The probate judge admitted it.

Downs, for the plaintiff and appellant.

1. This is a suit brought by a commission merchant against the defendant, as administrator of A. T. Norwood, deceased, for the balance due by account, arising from drafts and notes paid, and advances, all on account of the deceased.

2. The judgment of the Probate Court ought to be reversed, because the question, whether the plaintiff had funds to meet those drafts and notes, was not made by the pleadings, and if it was, the *onus* was on the defendant to show it. The plaintiff could not be required to prove a negative. 8 *Martin, N. S.* 257.

3. But if the *onus* is devolved on the plaintiff, the testimony abundantly shows the fact.

4. It appears from the face and words of the drafts, that no funds of the deceased were in the hands of the plaintiff with which to take them up, consequently the estate must be charged with them.

5. The rule of law on which the judge of probates decided the case, does not apply. It is not a suit on the drafs, but on account current, in which the amounts of the drafts are included, and they produced as vouchers to show how the plaintiff applied the funds in his hands.

6. The suit is, in fact, founded on the amount of two notes, one for one thousand four hundred dollars, the other for three thousand dollars; the guarantee to Hardesty & Neill of one thousand and ninety-six dollars and seventy-nine cents, and the balance for goods sold and delivered, and not on the drafts.

7. The sums we claim, have in fact been admitted. Admissions and accounts rendered, must be taken entire. 1 *Phil. Ev.* 84. 3 *Martin, N. S.* 452. 6 *Ibid. N. S.* 582. 1 *La. Reports*, 281.

8. An account rendered and not objected to, is binding on the party to whom it is rendered. 7 *Martin, N. S.* 140. 3 *La. Reports*, 544.

9. The two and one-half per cent. commissions, ought to have been allowed. The evidence in the case, completely brings it within the exceptions, to be found in the case of *Millaudon* vs. *Arnaud*, 4 *La. Reports*, 542.

10. The objection, that the testimony of one witness is insufficient to prove this account, as it is over five hundred dollars, does not apply. It could only apply, under any circumstances, to the first item of seven hundred and forty-three dollars, which is inserted in the account sued on, as the balance of a former account then unpaid. This item is abundantly proved by corroborating testimony, in support of the single witness.

11. The estate of Norwood, deceased, is bound by the guarantee of Norwood, made in his life-time in behalf of

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Hardesty & Neill, in his letter of credit to the latter; and the circumstance of the drafts being in the name of Hardesty & Neill, can make no difference in the binding effect of the letter. The very words of the letter are: "If you accept for Neill, I will be bound."

Andrews, for the defendant.

1. The testimony of a witness, that a balance of seven hundred and forty-three dollars existed at a certain time, is not competent evidence. The items on which such balance is struck, should be proved; and the testimony of one witness is not sufficient proof. *La. Code, art.* 2257. 5 *La. Reports*, 266.

2. Drafts drawn by *J. S. R. Guay*, should not be received in evidence under an allegation in the petition, *that drafts were drawn by J. H. Gray.* 3 *Martin, N. S.* 636. 2 *Ibid. N. S.* 666.

3. Where the acceptor of a bill sues the drawer, he must prove, 1st. The drawing of the bill; 2d. He must rebut the presumption of having funds in his hands belonging to the drawer, out of which to pay the bill, by showing the absence of them; and, 3dly. He must prove payment of the bill by himself, to some person authorised to receive it. The mere possession of the bill, is not even *primâ facie* evidence of payment. *Starkie on Ev. part* 4, 276. *Chitty on Bills, edit.* 1830, 410. 6 *La. Reports*, 336.

4. Where a bill or note is transferred by a special endorsement, the endorser must show a re-transfer to him, before he can maintain a suit in his own name. 7 *Martin, N. S.* 253. 1 *Ibid. N. S.* 101 *and* 373. 7 *Cranch*, 163.

5. An agreement to be bound for a draft, drawn by S. W. Neill, is not an undertaking for the firm of Hardesty & Neill. 4 *Cranch*, 224. 1 *Mason*, 368. *Coxe's Digest*, 357.

6. Where credit is given in consequence of the undertaking of a third person, in a letter of credit, he should be immediately notified of the same, and of the extent of his liability. *Starkie on Ev. part* 4, 649. 2 *Taunton*, 206. 1 *Mason*, 323. 7 *Cranch*, 69.

7. The guarantor of a draft is entitled to notice of non-payment, unless the drawer is insolvent when the draft becomes due. 2 *Taunton*, 206. *Starkie on Ev. part* 4, 650.

8. When the draft is for more than the guarantor bound himself, he is not liable even up to the amount which he agreed to guaranty. *Starkie on Ev. part* 4, 250. *Chitty, edit.* 1830, 67.

9. If after a bill, the payment of which is guarantied by a third person, becomes due, the creditor takes a note for the amount, from one of the drawers, and prolongs the time of payment, the guarantor is thereby discharged. *Starkie on Ev. part* 4, 650. *Ibid.* 1389. *La. Code, art.* 3032.

Bullard, J., delivered the opinion of the court.

This is an action instituted in the Probate Court, against the administrator of A. T. Norwood's estate, in which he claims the sum of five thousand four hundred and seventy-one dollars, for moneys advanced to the intestate in his life-time, for services rendered as commission merchant, for costs paid on acceptances for him, and as guarantor to one Neill, as well as for goods and merchandise sold and delivered to him, from June, 1831, to June, 1832, according to an account current annexed to the petition. That account exhibits a balance on a former account of about seven hundred dollars. It credits the deceased with sundry lots of cotton, sold at different times; and charges him with various drafts and notes paid by the plaintiff, in the course of his transactions with the intestate.

The defendant pleaded the general denial, and judgment being rendered in his favor, for a balance against the plaintiff, the latter appealed.

It appears from the evidence in the record, that the deceased and the plaintiff stood towards each other, for some years, in the relation of principal and factor. The latter received the crops of the former on consignment, for sale, and kept an account current, showing the amounts so received, and the sums paid on the drafts of the deceased, according to the usual course of business between planters and commission

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In an action on an account current founded on a long course of commercial transactions between the parties, in which payments are charged for sums paid to take up drafts accepted by the plaintiff, the possession of the draft by the acceptor is *primâ facie* evidence of the payments charged in the account, and may be given in evidence in support of such items in the general account.

The rule that an acceptor of a bill is bound to show not only the drawing and acceptance of the bill and its payment, but that it was put in circulation after acceptance, and that the drawer had no funds in his hands, applies only to cases where the acceptor declares upon a bill of exchange against the drawer.

Where drafts are charged in an account current as paid, to *Guay* and those offered in evidence are payable to *Gray*, if the amounts and dates of the

merchants. The account sued on shows a debit and a credit side, and many of the items of charge against the estate consist of sums paid on drafts and notes taken up by the plaintiff, and the notes and drafts are produced in evidence, as proof of the items of the account.

It is urged by the counsel for the appellee, that the acceptor, in an action against the drawer of a bill of exchange, is bound to show, not only the drawing and acceptance of the bill and its payment, but that it was put in circulation after acceptance, and that the drawer had not funds in his hands. That the drawer is always presumed to have funds in the hands of the acceptor, and that the acceptance itself is evidence of the fact. This rule, to a certain extent, has been recognised by this court. But we are of opinion, that in the course of transactions like those shown between these parties, the possession of the draft by the acceptor, is *primâ facie* evidence of payment, to be charged in account current, and may well be given in evidence in support of items in such general account. They are generally drawn in anticipation of produce to be shipped to the drawee, and the application of the strict principle contended for to a case like the present, might be productive of the greatest injustice; and it seems to us to apply only, to cases when the acceptor declares upon a bill of exchange against the drawer. In the case before the court, the execution of the drafts is proved; they are produced by the plaintiff; and a witness, who was the book-keeper, swears to the correctness of the different items of the account as charged.

One of the items charged in the account, is a sum of five hundred dollars, for two drafts paid in favor of J. H. Gray, 8–11th February, 1832. The two drafts adduced in evidence, are dated 8th February, 1831, at twelve months, in favor of J. S. R. Guay. It is contended, that there is such a variance in the name that they were inadmissible in evidence, and a bill of exceptions was taken to the opinion of the court, overruling the objection. The amounts and dates of the drafts correspond with those charged in the account current, and the only difference is in the name of the original holder;

Guay, instead of Gray. The strict rule contended for, applies with greater force in cases where the action is brought directly on the instrument. In this case, the money is charged as paid to Gray, and the draft and endorsement on it, shows that it was paid to Guay. As evidence of a disbursement made on account of the intestate, we think the document admisible, and the variance not fatal.

drafts correspond with those charged in the account, they will be received in evidence.

The estate is charged with a sum of one thousand ninety six dollars seventy-nine cents, as the amount of account of Hardesty and Neill, guarantied by A. T. Norwood. In support of this item of his account, the plaintiff produced two drafts of Hardesty and Neill, making together about that amount and a letter addressed to the plaintiff by the deceased, in which he says, "any thing you can do for the bearer Major S. W. Neill, whom I hereby introduce as my friend, will be done for me, he being a merchant in Clinton," and he adds, "P. S. If you should accept for Mr. Neill for one thousand dollars, I will be bound (by) this note." We concur with the court of the first instance, that the liability of the estate, is not sufficiently proved. It is a settled rule, that guarantees are to be construed strictly. Norwood might have been willing to become the security of Neill, and not of Hardesty and Neill. The engagement was personal, as to Neill, and did not, in our opinion, authorise any advance to a firm, of which he was a partner, on the credit of Norwood. 4 *Cranch*, 224. 1 *Mason*, 368. *Coxe's Digest*, 351.

A letter of guarantee must be construed strictly to charge the guarantor: so where A recommended B to the credit of C, and the latter made the advance to B and D, as a firm, on the faith of the guarantee: *Held* that the guarantor is not bound thereby.

The genuineness of a note of one thousand four hundred dollars, charged in the account, is contested by the administrator. Its execution by the intestate, is positively sworn to by a witness, whose credibility is not impeached. That evidence is opposed by the opinion of two witnesses, who state that the signature differs, in some respects, from the common signature of Norwood. One of them says, that it has no resemblance to the signature of the same party, to certain documents referred to, and filed in the suit. These negative statements cannot outweigh the direct affirmative oath of the witness, who testified that he saw the note signed; and we

The testimony of one witness to a signature, who swears he saw the party sign, and whose credibility is not impeached, will not be *invalidated* by the negative statements on oath of two witnesses made on a comparison of hand writing of the party, and his signature to documents on file in the suit.

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agree with the judge below, that its execution is sufficiently proved.

It is urged, that the first item of the account sued on, is not sufficiently proved by the oath of a single witness, and the defendant relies on the 2257th article of the Louisiana Code. That article declares, that all agreements relative to personal property and all contracts for the payment of money, when the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any competent evidence. Such contracts or agreements above five hundred dollars in value, must be proved at least by one credible witness and other corroborating circumstances. The counsel for the plaintiff endeavors to establish a distinction between an agreement to pay money, and proof of the balance of an account on settlement; and contends, that the silence of the intestate, when the account was rendered showing a balance of seven hundred and forty-three dollars, proved by a single witness, is sufficient evidence of such balance. We cannot adopt this reasoning; proof of a state of indebtedness, from which an agreement to pay is a legal inference, is in substance proof of the agreement itself, and where the amount exceeds five hundred dollars, the testimony of a single witness is not sufficient. But, he further contends, that the evidence is corroborated by a circumstance shown on the trial. That the defendant produced on the trial a letter, which is in the record, from the plaintiff to the intestate, in which the existence of this balance is mentioned as the reason for not accepting a draft at sight, drawn on him by Norwood. The letter is of a date prior to the one on which the balance is charged, and the alleged balance is not the same. This, therefore, is not, in our opinion, a fact which goes to prove that the balance claimed was due, as charged. This item of the account, must therefore, be rejected.

Where the amount of a debt or an agreement to pay money, exceeds the sum of five hundred dollars, the testimony of one witness alone is insufficient to prove such debt or demand.

In the progress of the trial, the defendant offered in evidence certain letters and accounts of sales from the plaintiff, of a date anterior to the first item of the account sued on. Their introduction as evidence was opposed, on the ground that they were irrelevant, and a bill of exceptions taken to

their admission, as documents emanating from the plaintiff, and relating to the money transactions of the parties, we think them admissible. But the plaintiff cannot be charged with the amounts of sales shown, because, although the evidence of Harvey may be insufficient to prove a balance on settlement afterwards, so as to enable the plaintiff to recover that balance, yet it suffices to show that the funds received previously to that date, had been accounted for. Proof of payment is not proof of a contract. If the defendant seeks to charge the plaintiff for cotton sold on his account, prior to the 3d June, 1831, he is repelled by evidence that a settlement of the account took place at that time, which resulted in a balance in favor of the plaintiff. The record is full of evidence, that an account current did exist between the parties, in relation to the sale of produce, and the witness proves that a settlement took place at a particular time.

Accounts and letters relative to sales made by the plaintiff, and rendered to the defendant anterior to the date of the first item of the account sued on, are admissible in evidence; because, it may also be shown that a subsequent settlement took place, and the moneys arising from such sales were accounted for.

It is further contended by the defendant, that in relation to the two notes sued on, the plaintiff, who was the original payee, and appears to have endorsed them, cannot recover without showing a re-transfer to himself. Both the notes were drawn by Norwood in favor of the plaintiff, and by him endorsed in blank, and both show a subsequent endorser in blank. This court has held, that re-possession of a note once specially endorsed by the payee, is not evidence of title, but that it is, if the transfer is in blank. 7 *Martin, N. S.* 353.

The re-possession of a note once specially endorsed by the payee, is not evidence of title to it, but that it is, if the transfer is made in blank.

Parole evidence to prove an agreement to pay interest at ten per cent., is clearly illegal and inadmissible.

Parole evidence to prove an agreement to pay interest at ten per cent. is clearly illegal and inadmissible.

Rejecting the first item as not proved, the amount charged on the guarantee, and the interest account, there appears to us to be a balance fairly due to the plaintiff, of three thousand four hundred and thirty-five dollars and twenty-eight cents.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be avoided and reversed, and that the plaintiff and appellant recover of the defendant, as administrator of the estate of A. T. Norwood, deceased, the sum of three thousand four hundred and thirty-five dollars and twenty-eight cents, with costs in both courts.

BOWMAN *vs.* FLOWER.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In a petitory action, the plaintiff cannot recover any part of the land in the possession of the defendant, which is covered by his title, and which is not shown to be embraced within the limits of the patent, under which the plaintiff holds.

In a suit, involving the question of limits and boundaries, between two tracts of land, where the parish surveyor, called as a witness, was asked the following question: "were you called upon as a surveyor of the state, to fix the boundaries between the parties, under the provisions of the Civil Code, where would you establish it, with the lights before you?" *Held*, that the question was illegal, as the answer would have been, to decide at once, the controversy between the parties, as well questions of law, as of fact, and cut the knot which courts and juries had labored years to untie.

Surveyors, when called as witnesses, may properly be questioned as to the appearance of old lines, marks upon trees, and their opinion as to the age of certain marks on trees, and similar facts, connected with their profession.

The plaintiff, who is a resident of the state of Pennsylvania, alleges, he is owner and proprietor of a tract of land, situated in the parish of West Feliciana, and granted by the Spanish government, in to one John Collins, from whom, as grantee, he derives a regular, legal title. He states, that the defendant has taken illegal possession of about thirty arpents of said tract of land, which he continues to hold, and has cut the timber therefrom, and cultivated the greater part ever since January, 1815. He prays judgment, delivering him the possession of the land, together with rents and profits.

The defendant pleads a general denial; and avers that he, and those from whom he derives title, have been in the quiet and peaceable possession of the premises, for more than thirty years, and prays to be dismissed with his costs.

The defendant amended his answer, by averring, that in ascertaining a correct limit or boundary between them, it would be found, that the plaintiff was in possession of lands belonging to the defendant; and he prays judgment for whatever quantity may be so found.

It was admitted and agreed by the parties, that all the intermediate transfers have been regularly made, from the original patentees, to the present holders.

It was also agreed, that the jury might find a special verdict. On the 17th December, 1822, the jury returned a verdict in favor of the plaintiff, establishing his corner, and that the line be run west from thence, as laid down in the plat of survey, made in the case; upon which the court rendered judgment, that the boundary line between the plaintiff and defendant, shall forever hereafter be fixed and established according to said verdict, and that the plaintiff recover from the defendant, the property and possession of all land and improvements, heretofore possessed by the defendant, north of said line.

A new trial was granted, on the ground of newly discovered evidence, since the trial, &c.

On the second trial, the jury found a verdict for the defendant, that the line running *east* from the corner established in the first verdict, is to be the true boundary line between the parties. Judgment was rendered thereon, accordingly.

A bill of exception was taken in the course of the trial, to the opinion of the judge, admitting certain depositions in evidence. On appeal, the judgment was reversed on this point, and remanded for a new trial. See 2 *Martin, N. S.* 267.

On the return of the case, it was agreed, that the titles to the land in dispute, were to be held complete, and the cause tried as between the original parties. The jury found another verdict, fixing another boundary between the contending parties, different from that contained in the two first verdicts.

After an unsuccessful effort to obtain a new trial, and to arrest the verdict, on the ground of a mistake; the

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defendant appealed from the judgment rendered thereon. See 3 *Martin, N. S.* 641.

When this cause came back the second time, it was tried on a mass of evidence, taken under commissions, and in open court, besides the original titles of the contending parties.

The jury returned a verdict for the plaintiff, designating the boundary line between the parties, in reference to a diagram on file.

The defendant's counsel moved the court to grant a new trial, on the following grounds:

1. The verdict of the jury, appears clearly contrary to law and evidence.

2. The defendant has discovered, since the trial, evidence important to the cause, which he could not with due diligence, have obtained before.

3. That manifest injustice has been done in the case, by the verdict of the jury.

The defendant's affidavit, setting forth the newly discovered evidence in detail, was filed, with the affidavit of the parish surveyor; the principal fact disclosed, was the alleged discovery of the true corner tree, which would materially change the boundary between the parties.

The plaintiff, in answer to the motion for a new trial, alleged that the evidence, pretended to have been discovered, since the trial, is unimportant, and if true, could in no manner affect the verdict, &c. Testimony was taken on the issue made for a new trial.

The district judge was of opinion, no counter affidavits or evidence could be received on a motion for a new trial; and overruled the motion accordingly. The defendant's counsel excepted to the judgment of the court, rejecting counter affidavits and testimony offered, pending the motion for a new trial.

Judgment was rendered on the 21st December, 1826, confirming the verdict, establishing the boundary line between the plaintiff and defendant, in favor of the former, and that he recover all the land occupied by the defendant, north of

said line, and be put in possession thereof. From this judgment, the defendant again appealed.

During the trial, there were several bills of exception taken, and those that were relied on, in this court, are fully stated in the opinion given in the cause; as also the original Spanish and other titles, offered in evidence.

Turner, for the plaintiff.

Downs, for the defendant.

1. A new trial ought to have been granted on the grounds prayed for.

2. There was error in the opinion of the court, refusing to permit the surveyor to state, where he thought the line ought to run.

3. The fallen gum is the true corner, and gives the defendant all he contends for.

4. There is a susplus in the land to be divided, and this will give the defendant more than he has occupied or claimed. *La. Code*, 847.

5. Prescription must govern this case, and which operates favorably to the pretensions of the defendant. *La. Code*, 848.

Bullard, J., delivered the opinion of the court.

This case has been twice before this court, on appeal, and two successive judgments have been reversed, one in favor of the defendant, and the other in favor of the plaintiff. On the last trial in the court below, the jury established a boundary between the adjoining tracts of land, held by the parties respectively, of which the defendant complains, and he asks a reversal of the judgment pronounced thereon.

In a petitory action the plaintiff cannot recover any part of the land in the possession of the defendant, which is covered by his title, and which is not shown to be embraced within the limits of the patent under which the plaintiff holds.

The action appeared to the court before, as it appears now, essentially petitory, and consequently the plaintiff cannot recover any part of the land in possession of the defendant, which is covered by the defendant's title, and which is not shown to be embraced within the limits of the patent, held by the plaintiff.

The titles of the parties are of equal dignity, and that of the defendant the oldest. The patent in favor of W. P.

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Collins, which is admitted to be the defendant's title, calls for a superficies of six hundred and forty arpents, having a front of sixteen arpents on the Bayou Sarah, by a depth of forty arpents, bounded on the south by Bernard Higgins, and on the north by John Collins. That of John Collins, under whom the plaintiff holds, is for eight hundred arpents, having a front of eighteen arpents on the Bayou, and a depth of forty three arpents and six perches, or six-tenths of an arpent, bounded on the south by W. P. Collins, and on the other sides by vacant land, at the time the primitive title was granted. The side lines of both patents, are represented on the figurative plans, made by Trudeau, as parallel to each other, and running due west from the Bayou.

It is apparent, from a simple inspection of the titles, and the plats of survey, returned under the order of the District Court, that the line C D, fixed by the jury as the dividing line between the two patents, cuts off a part of the defendant's land, and gives to the plaintiff more land than he is entitled to, under the patent of John Collins, as surveyed by Trudeau, beginning at Lytels on the south.

It is suggested to us by counsel, that there is evidently between Lytels and Higgins, more land than is embraced in the two patents, and that an equitable division ought to be made of the surplus, between the parties. If this was simply an action of boundary, perhaps in the absence of proof of a consentional boundary, and the uncertainty as to the lines really made by the Spanish surveyor, we might think ourselves authorised to take that course. Much of the litigation in this case, has probably arisen from a vain search for a common corner, to the two patents, on the back parts of the tracts. Such a corner cannot exist, because the tracts have unequal depths. All the evidence therefore, which has been given, leads to no satisfactory results. We have not before us such data, as will enable us to decide definitively between the parties, as to the true division line, and can only say, that the line settled by the judgment below, is in our opinion, inconsistent with the written titles, exhibited by the parties. It appears, that the plaintiff is in possession, under

In a suit involving the question of limits and boundaries between two tracts of land, where the parish surveyor, called as a witness, was asked the following question: "Were you called upon as a surveyor of the state, to fix the boundaries beween the parties under the provisions of the Civil Code, where would you establish it, with the lights before you?" *Held*, that the question was illegal, as the answer would have been to decide at once, the controversy between the parties, as well questions of law as of fact, and cut the knot which courts and juries had labored years to untie.

Surveyors when called as witnesses may properly be questioned as to the appearance of old lines, marks upon trees and their opinion as to the age of certain marks on trees, and similar facts connected with their profession.

the patent, of all the land north of Lytel's land, as represented by Trudeau, which in fact, is a greater extent than is expressed in his patent, if he recovers according to the judgment rendered in this case.

Our attention is called to a bill of exceptions, to the opinion of the district judge, who refused to permit a certain question to be put to a parish surveyor, who was called as a witness. The question proposed, and objected to, was in the following words: "Were you called upon as a surveyor of the state, to fix the boundaries between the parties, under the provisions of the Civil Code, where would you establish it, with the lights before you."

We are of opinion that the District Court did not err, in refusing to permit such a question, to be answered by the witness. The answer to it would have been to decide the controversy between these parties, as well questions of law as of fact, and to cut at once the knot, which courts and juries had laboured years to untie. If the answer to such a question, were legal evidence, it would be binding on this court, and a judgment, disregarding it, would be clearly contrary to evidence. Professional men are sometimes called to testify, and their opinions are evidence. The surgeon who states, that a certain wound, in his opinion, produced death, speaks of the effect which would propably result from a given cause, according to his knowledge of anatomy, and his professional experience. The effect already exists, and his opinion is asked only as to the probable cause. But the surveyor was asked, not whether a plat had been drawn, according to the principles of his art, but what line ought to be established, according to the Civil Code. Surveyors may properly be questioned, as to the appearance of old lines, marks upon trees, and their opinion as to the age of certain marks upon trees, and similar facts, connected with their profession. The same objection exists, though not to the same extent, to the question propounded to another witness, who was a surveyor under the United States.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, the verdict set aside, and the case remanded for a new trial, the costs of appeal to be paid by the appellee.

LANOUE *vs.* REED ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where a married woman is sued as heir, it is necessary that the husband be cited to assist his wife, in defending the suit.

So where the wife as heir, was sued together with her husband, and the citation of appeal is directed to her alone, although served on the husband, the appeal will be dismissed, for want of legal citation.

This suit was instituted against John Reed, testamentary executor of Mrs. Sarah Rowell, deceased, for the rescission of the sale of three slaves, which the plaintiff purchased at the sale of the succession of Mrs. Rowell. The plaintiff prays, that the executor and Mrs. Mary Pierce, wife of Constantius Pierce, assisted by her husband, be cited &c. The citation in the District Court, was issued and directed to the executor, and *Mrs. Mary Pierce, wife, &c.* On the trial, the defendant had judgment, and the plaintiff appealed. The citation of appeal was directed to Reed, the executor, and to *Mrs. Mary Pierce, testamentary heir of* Mrs. Sarah Rowell, deceased, wife of Constantius Pierce, &c., and served on Reed and "*C. Pierce in person.*" Pierce, the husband, was not directed, in the body of the citation, to *be cited*, although the sheriff made personal service on him alone.

A. N. Ogden, for the defendants and appellees, moved to dismiss the appeal on the following grounds:

1. That Constantius Pierce, the husband of Mrs. Mary Pierce, one of the appellees, has not been *cited* and made a party to the appeal, as is required by law.

2. That the certificate of the judge, that the evidence found in the record, is conformable to his notes of the same, is insufficient, the evidence not having been taken down in writing, by the clerk of the court, and there being no statement of facts, bill of exceptions, or errors, assigned.

Brunot, contra.

Mathews, J., delivered the opinion of the court.

The appellees move to dismiss this appeal, on the ground of want of legal citation.

The suit is brought against an executor, and a testamentary heir; the latter being a married woman, was sued together with her husband. He is not cited in the appeal, which ought to have been done, being a party to the suit, necessarily made so, to protect the interest of his wife.

It is, therefore, ordered, that the appeal be dismissed, at the cost of the appellant.

Where a married woman is sued as heir, it is necessary that the husband be cited to assist his wife in defending the suit.

So where the wife as heir, was sued together with her husband, and the citation of appeal is directed to her alone, although served on the husband, the appeal will be dismissed for want of legal citation.

BURROUGHS *vs.* NETTLES.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In a suit between the transferee and the maker of a promissory note, where the answer alleges fraud and collusion, between the payee and transferor of the note and the plaintiff, parole evidence of the acts of the former is clearly admissible against the latter, if the collusion is established.

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And where the jury are to pass at once on both the *plea* of collusion and the acts of the transferor, charged with colluding with the plaintiff, the evidence relating to these two points, must be administered simultaneously.

On the score of irrelevancy, the objection to testimony is seldom of any avail in the Supreme Court.

The promise of the vendor of a slave, to rescind the sale on account of redhibitory defects, is admissible in evidence, in a suit between the transferee of a note and the maker, for the price of the slave, to show the existence of the redhibitory defects.

Where the day of payment of a note is past, at the time of its transfer, it is a sufficient warning to whoever receives it, that the maker may have some just reason to withhold payment, as he has a right to any equitable defence after the transfer, which he might have successfully urged before.

A note payable on demand, may be sued upon immediately, or pleaded in compensation.

A verdict found on the plea of fraud and collusion, is entitled to particular attention, because they are the objects for the cognizance of the jury.

This is an action on a promissory note, of the following tenor: "$675. On demand, I promise to pay A. C. M'Daniel or bearer, the sum of six hundred and seventy-five dollars, for value received, this 22d day of April, 1833.

"James Nettles."

"I transfer the within note to Henry Burroughs, for value received, this 1st day of June, 1833.

"A. C. M'Daniel."

The plaintiff alleges, he has made an amicable demand, upon the maker of the note, of payment, which has not been complied with; he, therefore, prays judgment for the amount thereof, and interest from judicial demand.

The defendant pleaded a general denial, and that said note was never *bonâ fide* transferred to the plaintiff; that he gave no valuable consideration therefor; that it was not transferred at the time it purports; and that it was never in the possession of the plaintiff, who is neither the legal or equitable holder thereof; that said transfer was simulated and fraudulent, and made with the intent to cheat and defraud this defendant, and deprive him of his equitable

defence against said note, in the hands of the payee; that said note was fraudulently obtained from him without any valuable consideration; that said M'Daniel agreed to sell him a negro man, by the name of Hector, for the amount of the note, but failed to make any title and had none himself, the negro being the separate property of his wife. He further states, that in pursuance of an agreement to cancel the sale, he returned the slave to M'Daniel, who appointed a time to meet him and deliver up the note, and failed; that said slave was discovered to be afflicted with a redhibitory disease, of which he has since died, &c.; that the plaintiff participated in the fraud practised in this case, and was cognizant of all the facts at the time of this pretended transfer.

The defendant avers, that he has been put to much trouble and expense by the proceedings against him, and sustained damages to the amount of eight hundred dollars; wherefore he prays judgment that his note be given up or cancelled, and for damages and costs.

The plaintiff introduced in evidence the deposition of Sarah Wisdom, taken under a commission, before a justice of the peace. She declares, the note of Nettles was given in part payment of the price of several slaves, sold by Elizabeth Burroughs to Jane M'Daniel, the former the wife of the plaintiff and the latter the wife of the transferor of the note. Witness saw M'Daniel endorse the note to plaintiff, at or about the time it bears date; that plaintiff sent the note to Nettles for payment by M'Daniel; heard M'Daniel tell plaintiff it was not paid, and the latter told him to put the note in suit for collection. Witness knows the note was given by Nettles to M'Daniel for a negro man, named Hector, whom she knew to be healthy and sound at the time.

Dr. *Skipwith* was called by defendant, about the 6th September, 1833, to see Hector, who was sick. "Defendant said, the negro had been sent back to him by M'Daniel, and he was determined not to keep him."

The defendant's counsel objected to the reading of Sarah Wisdom's deposition, on the ground that some of it was hear-

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say, and that it was not the best evidence the case admitted of. The court admitted it, and a bill of exceptions was taken.

The cause, on these pleadings, and the evidence adduced by the parties, was submitted to a jury, who found a verdict for the defendant. From the judgment rendered thereon, after an unsuccessful motion for a new trial, the plaintiff appealed.

Lawson, for the plaintiff.

1. The evidence shows, the note in suit was executed the 22d April, 1833, in favor of M'Daniel, *or bearer*, who on the 1st June of the same year, transferred it to the plaintiff, in part payment of the price of some negroes, purchased by *his wife* from the plaintiff's wife.

2. This court must either reject the testimony excepted to, and remand the cause for a new trial, or reverse the judgment and give one for the plaintiff.

3. The court erred in permitting improper and illegal testimony to go to the jury.

4. The court suffered matters and things between other parties to be given in evidence against the plaintiff in this suit, and permitted the witnesses to detail to the jury hearsay evidence, and testimony irrelevant to the issue.

5. The court erroneously permitted the defendant to give parole proof of a verbal agreement made by defendant and M'Daniel, to rescind the sale of the slave and cancel the note, two months after it was transferred to the plaintiff. 4 *La. Reports*. 64, 20, 166.

6. The judgment ought to be reversed; the execution and assignment of the note for a valuable consideration, is admitted and proved. The defendant has failed to show the slave was afflicted with a redhibitory disease, and he has failed to show fraud and simulation.

7. Without fixing a knowledge of fraud on the plaintiff, it could not be legally urged in bar or avoidance of his rights, though established against the transferor of the note, which is not done in this case. *Chitty on Bills, edit.* 1830, *p.* 70, 67, *note* 1 *and* 9—400–1.

Andrews, contra.

Martin, J., delivered the opinion of the court.

This is an action instituted by the holder and *transferee* of a promissory note, payable to bearer, against the defendant, as the drawer and maker thereof. The latter pleaded a general denial; and fraud and collusion between the payee and *transferor* of the note, and the plaintiff; and also the failure of the consideration for which the note was given, it being originally given for the price of a slave, who was attacked with a redhibitory disease. He likewise prayed for a rescission of the sale. There was a verdict, and judgment rendered thereon for the defendant; from which, after an unsuccessful effort to obtain a new trial, the plaintiff appealed.

The record of the case shows, that the note was given on the 22d of April, 1833, and made payable to A. C. M'Daniel *or bearer*, who on the 1st day of June following, transferred it by a written transfer to the plaintiff, in part payment of several slaves, purchased by the wife of M'Daniel, from the wife of the plaintiff. The transfer was made by the delivery of the note, accompanied by a written assignment on the back of it. It is shown that the slave was attacked with a redhibitory disease, and shortly after returned to the vendor, who refused to receive him. He soon after died, in the possession of the defendant.

Our attention is first drawn to a bill of exceptions, taken by the plaintiff and appellant's counsel, to the admission in evidence of the testimony of W. Waddle, S. Nettles, W. Nettles and John Nettles, which testimony was taken down by the clerk, on the ground that what they related, was *res inter alios acta*. 2. That the testimony is irrelevant, or founded upon hearsay. *Lastly*, it is opposed on the ground of an attempt made to give parole evidence of the cancelling or rescinding the sale of a slave. The court overruled the objections, on the ground of the plea of fraud and collusion.

The answer, alleging collusion between the plaintiff and the payee, who transferred the note, clearly authorises evidence of the acts of the latter to be given against the former,

In a suit between the transferee and the maker of a promissory note, where the answer alleges fraud and collusion between the payee and transferror of the note and the plaintiff, parole evidence of the acts of the former is clearly admissible against the latter, if the collusion is established.

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And where the jury are to pass at once on both the *plea* of collusion and the acts of the transferor, charged with colluding with the plaintiff, the evidence relating to these two points must be administered simultaneously.

On the score of irrelevancy, the objection to testimony is seldom of any avail in the Supreme Court.

The promise of the vendor of a slave to rescind the sale on account of redhibitory defects, is admissible in evidence, in a suit between the transferee of a note and the maker, for the price of the slave, to show the existence of the redhibitory defects.

Where the day of payment of a note is past at the time of its transfer, it is a sufficient warning to whoever receives it, that the maker may have some just reason to withhold payment, as he has a right to any equitable defence after the transfer which he might have successfully urged before.

if the collusion was established. And as the jury was to pass at once, both upon the plea of collusion and the acts of the transferor of the note, evidence relating to these two points, was to be administered simultaneously. On the score of irrelevancy, the objection to testimony is seldom of any avail in this court. Irrelevant testimony is easily rejected, and has no other effect than to cause a loss of time. It often happens that, in order to illustrate the fact to which he deposes, a witness is necessarily led into the detail of circumstances, and the information which he has received in relation to it. In such a case, if the party against whom the witness is introduced, apprehends danger, he may warn the jury of the obligation they are under to disregard hearsay testimony, and if necessary, call on the court to instruct the jury accordingly.

The promise of the vendor of the slave, for which the note was given, to rescind the sale and return the defendant's note, if not admissible to support a demand for the rescission of the sale thereon, may be received to establish the admission of the vendor of the existence of a redhibitory vice. It does not appear to us, that the District Court erred in admitting the evidence.

On the merits: if the note was still in the possession of the vendor and payee, there cannot be the least doubt but that the evidence adduced would discharge the defendant from the obligation of payment. His counsel has concluded that the same consequence follows in the present case:

1. Because the note, having become the property of the plaintiff after the day of payment was passed, he holds it subject to every equitable plea or defence that might be opposed to his transferor.

2. Because the evidence shows, that the plaintiff colludes with his transferor to deprive the defendant of the means of a defence, which would be destroyed by a fair transfer of the note to a party without notice.

I. The circumstance of the day of payment of the note being past, at the time of transfer, is a sufficient warning to whoever received it, that the maker may have some just reason to withhold payment; since it is held he has a right to

any equitable defence after the transfer, which he might have successfully urged before. A note payable *on demand*, may be sued upon immediately by the legal holder; or may be pleaded in compensation: yet, in the usual course of affairs, it is not expected to count on instant payment. Hence, if it be offered to be transferred shortly after its date, the circumstance of its having been the object of an instant call for payment, does not necessarily present the same degree of suspicion, if any, as in the case of a note payable on a given day, which is already past.

A note payable on demand may be sued upon immediately, or pleaded in compensation.

We, however, refrain from expressing any opinion on the first point, because that which we have formed on the second, renders it unnecessary.

II. The jury have passed upon the plea of fraud and collusion, and found in favor of the defendant. A verdict on these pleas is entitled to the particular attention of this court, because they are the peculiar objects of the cognizance of a jury. They often require the weighing and comparing of a number of circumstances apparently of a trivial nature, which, separately viewed, appear very unimportant; but which circumstances, when brought together and compared with each other, acquire weight which destroys the equilibrium that kept determination in suspense. A knowledge of all the circumstances, their nature and the standing and character of the witnesses and parties, is often of incalculable utility.

A verdict found on the plea of fraud and collusion is entitled to particular attention, because they are the objects for the cognizance of the jury.

Collusion in this case, is charged on persons nearly connected by affinity; who lived in the same neighborhood, and who appear both to have had an intimate knowledge of the details of the transaction, in which the note originated. The transferee or plaintiff, is stated to have employed the *transferor* as his agent in the prosecution of this suit, and the latter after the transfer, appears to have considered himself as still the owner of the note, and he appears to have retained the possession of it. He declared his intention after the transfer, to claim interest at the rate of ten per cent. The counsel for the defendant states, that the transferee prosecutes the present suit, by the agency of the transferor. In support of this charge they

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show that the latter sent a young woman, who resides in his house, to an adjoining parish, to be examined as a witness, with a view of dispensing with her examination in court.

Under all the circumstances of the case, we are unable to say the jury came to a wrong conclusion in forming their verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

GREEN *vs.* HUDSON'S SYNDICS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Proof of possession, is indispensable to support a title, based on the plea of prescription.

The vendor, from whom the defendant's title is derived, is an incompetent witness, to prove the possession of the latter, so as to form the basis of a title, by a prescription.

The vendor is an incompetent witness, on the ground of interest, for a party deriving title from him, even when his deed to his vendee, contains no clause of warranty.

The vendor is bound in warranty to his vendee, when his deed of sale does not exclude it. His obligation extends at least so far, as to require him to refund, with interest, in case of eviction.

This is an action, instituted to obtain a remuneration in damages, and a partition of a tract of seven hundred and twenty arpents of land, which the plaintiff alleges he purchased, in conjunction with one R. C. Walker, at the probate sale of the succession of Mrs. Sarah Rowell, deceased, situated on the Mississippi River, at the mouth of Sandy

Creek, in the parish of East Feliciana. The plaintiff further alleges, that since the purchase, Walker has sold and conveyed his interest, in the said tract of land, to James Hudson, of West Feliciana. That he has himself, since said purchase, sold one-half of his interest in the premises, to one J. C. Walker, who, together with Hudson, is in possession of the *most valuable* part of the land. He urges, that in consequence of said possession, he is entitled to remuneration, from his said co-proprietors, Hudson and Walker, which he estimates at ten thousand dollars; and prays for a partition of the land, and judgment for the difference in value of that portion held by Hudson and Walker, against them, according to his estimate as alleged; and for damages for the use and occupation of the premises, by them.

Hudson, having made a *cessio bonorum*, syndics were appointed to represent his estate. The syndics, after their appointment, prayed *oyer* of all the papers and documents, on which the plaintiff relies, in support of his title, to the land claimed in the petition. The documents comprising the proceedings of the Probate Court, and sale of the land, were ordered to be exhibited, and the prayer, as to the remainder, was overruled by the court. The defendants excepted to this part of the opinion of the court.

The plaintiff filed a declaration, in writing, stating that the sale from him to Walker, was cancelled, and that he claimed one moiety of the land in contest, under purchase at probate sale.

Hudson's syndics answered to the merits. They averred that Hudson held two hundred and ninety-eight acres of the tract of land in question, under an outstanding title, adverse to that derived from the probate sale, and under which the plaintiff claims; which was derived from a sheriff's sale, for taxes due on said land, by one Samuel Moore, made the 29th June, 1818, and which was purchased by one J. P. Michel, who sold and conveyed it to R. and J. Caruthers, by a deed *without clause of warranty*, and who sold it to the insolvent Hudson. The syndics further aver, that the plaintiff cannot maintain his action of partition, until the

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title to the two hundred and ninety-eight acres is first settled. They pray judgment, recognizing this title, and that the plaintiff's suit be dismissed.

The syndics also pleaded a general denial, to all the plaintiff's claim, embraced by the two hundred and ninety-eight acre tract, and prescription of ten years continued possession, under a good and legal title.

On these issues, the parties went to trial. In order to support the plea of prescription, the defendants' counsel offered Michel, the purchaser of the two hundred and ninety-eight acres of the disputed premises, at sheriff's sale, to prove possession in the defendants. The introduction of this witness, was opposed by the plaintiff's counsel, on the score of *interest*. His competency was urged, on the grounds that he sold and conveyed the land in contest, to his vendee, by a *deed without* warranty, and that he was not thereby responsible in warranty. The court received him, and the plaintiff's counsel took his bill of exceptions to the decision, admitting the witness. The plaintiff finally obtained judgment, from which the defendants appealed.

Lawson and Ripley, for the plaintiff.

Downs and Saunders, for the defendants.

Mathews, J., delivered the opinion of the court.

In this case, the plaintiff alleges, that he has title to an undivided half of a certain tract of land, as described in his petition, containing seven hundred and twenty arpents, and that the defendants are joint owners with him, of the other moiety of said land. Partition is prayed for, in conformity to the alleged rights and claims of the parties.

On the part of the defendant Hudson, a title is set up to two hundred and ninety-eight acres, being a part of said tract of seven hundred and twenty arpents, derived from a source different, and independent of the title alleged by the plaintiff, and pleads a right by prescription, &c. The original document of title, offered in support of the prescription pleaded, is

Proof of possession is indispensable to support a title based on the plea of prescription.

The vendor from whom the defendant's title is derived is an incompetent witness to prove possession of the latter, so as to form the basis of a title by a prescription.

The vendor is an incompetent witness on the ground of interest, for a party deriving title from him, even when his deed to his vendee contains no clause of warranty.

The vendor is bound in warranty to his vendee, when his deed of sale does not exclude it. His obligation extends at least so far as to require him to refund with interest in case of eviction.

a deed made in pursuance of a sale for taxes, wherein the assessment was made against one Samuel Moore, on a tract of land supposed to contain three hundred and fifty-six acres, a part of which was sold, amounting to two hundred and ninety eight acres, to a certain John P. Michel, who bid the amount of taxes and costs, for this portion of the whole land assessed. Michel afterwards sold to Richard and John Caruthers, who sold and conveyed to the defendant Hudson. The deed from Michel to his vendees, contains no clause of warranty, neither is there any clause which excludes it.

Judgment was rendered in the court below, in favor of the plaintiff, from which the defendants appealed.

The pleadings in this case, clearly involve a question of title. The basis of that set up on the part of the defendants, is prescription. To support a title of this kind, proof of possession is indispensable. In order to establish this fact, they offered as a witness, Michel, from whom the title under which they claim, is derived, who was objected to, as incompetent by the plaintiff; he was, however, received by the court, and a bill of exceptions taken. The witness thus offered, is clearly incompetent, on the ground of interest. He is bound in warranty, on his deed to the Caruthers, for that act does not exclude it. His obligation extends, at least, to require him to refund the price, with interest, (if no further) in the event of eviction. See *La. Code, art.* 2476, *et seq.*

The judge below erred in admitting the witness. And as it is possible, that the defendants might have proven the fact of possession by other testimony, if they had not been led into error by the decision of the judge *a quo* in allowing their witness to testify who was legally incompetent. Under these circumstances, we think the cause ought to be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and that the cause be sent back to said court, to be tried *de novo*. The appellee to pay the costs of this appeal.

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APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, THE JUDGE OF THE FOURTH (THEN JUDGE WATTS,) PRESIDING.

A mandatory is not considered to have exceeded his authority, when he has fulfilled the trust confided to him, in a manner more advantageous to his principal, than that expressed in his appointment.

The circumstance of the factor, being a creditor of the consignor or owner, and the necessity of his advances being covered, will not of itself justify a sale below the limited price.

So where twenty bales of cotton were consigned, and limited to be sold for nine and a half cents, or *more*, and without further instructions, the factor or agent sells at seven and eight and a half cents per pound; and it is proved, that a higher price than that at which the cotton was sold, could not be obtained; and when it also appears, that this was the highest market price, obtainable at any time between the sale and the inception of suit, the price at which the cotton actually sold, is all the principal or owner can recover.

This is an action, instituted by the owner, to recover from the factors, the sum of seven hundred and eighty dollars ninety cents, as the price and proceeds of twenty bales of cotton, consigned for sale at the limit of nine and a half cents per pound, according to the following receipt:

"Received of John George, twenty bales of cotton, marked J. G., from one to twenty, for sales and returns at *nine and a half cents, or more.* May 28th, 1831."

"John T. M'Neill, & Co."

Notwithstanding this agreement, the defendants, through their agents, Hagan, & Co., sold the cotton in July following, below the limits; eight bales at seven and three-fourth, and twelve at eight and three-fourth cents per pound. This suit is brought to compel them to account to the plaintiff, at the *limit price.* There is no allegation in the petition, and no attempt on the trial, to prove that cotton of like quality of that of the plaintiff, sold between the date of the agreement, and the institution of suit, at nine and a half cents, or for any higher price, than that stated in the account of sales.

The defendants pleaded a general denial; and that they were always ready to account, and pay over the proceeds of said cotton, at the price for which it sold; or if the plaintiff was dissatisfied with the sale, they would replace it with other cotton of a similar sample. They further state that the cotton was never worth the limit, and that the price at which it sold, was more than it was worth. They also set up several sums, amounting to three hundred dollars, which they plead in compensation of the plaintiff's demand.

It appeared in evidence, that the cotton was held up until late in the season, to obtain the limited price, but the market not allowing it, sales were made at the prices stated in the account of sales, without further instructions from the owner.

Upon these issues and facts, the parties went to trial. The district judge, who presided at the trial, instructed the jury, "that there was a plain violation of the contract, on the part of the defendants, but that before the plaintiff could recover against the defendants, any thing beyond the actual proceeds of the cotton, it was incumbent on him to allege and prove, that he had sustained damages, by such violation of the written agreement; that if at any time, between the date of the contract, and the institution of the suit, cotton of similar quality with plaintiff's, had sold for ten, fifteen, or twenty cents per pound, and he had alleged and proved this fact, he would be entitled to recover the difference between the actual sales and such price; but that in this case the plaintiff had not done so, he had no right to recover beyond the balance in defendant's hands, after allowing the claims pleaded and proved in compensation."

The jury returned a verdict for the plaintiff, of four hundred and thirty-nine dollars thirty cents, after deducting the defendant's claims, set up in compensation, but at the same time, charging them with the cotton, at the rate of nine and a half cents per pound.

Both parties were dissatisfied with the verdict, but the court considered, as the defendants acted incorrectly, in violating an express agreement, when they could easily have

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consulted the plaintiff, and still retained the proceeds of the cotton in their hands, that the verdict had done no more than substantial justice, although contrary to the principles of law, given in the charge, *denied a new trial.* From the judgment rendered on the verdict, the defendants appealed.

Lawson, for the plaintiff.

1. When there is a special agreement between the principal and factor, that the consigned property shall not be sold under a limited price, the consignee violates that agreement, if he sells under that price, and the principal can recover the limit price stipulated, or ascertained damage, on alleging and proving the violation of that contract. *La. Code, art.* 1928, 2979, 2980. 2 *Pothier, on Ob.* 93, 98. 1 *Mass. Reports*, 27, 54, 288.

2. The defendant violated his contract, by substituting other persons to sell the cotton, and is liable for his sub-agent's acts. 1 *Livermore on Agency*, 54, 64, 66, 381.

3. When the power of a factor is limited by instructions, he is bound to pursue those instructions. If he deviate from his orders, though with a view to his employer's interest, he will be liable for the consequences. The loss sustained by the principal, is the measure of damages, which he is entitled to recover against his factor. 1 *Livermore on Agency*, 368, 369, 342, 398, 403.

4. The rule of law is, that the consignor of goods, limiting the price at which the factor may dispose of them, and the factor violates his instructions by selling them for less, the consignor is entitled to recover, not only the amount for which the goods were sold, but also the difference between that amount and the price limited. 1 *Livermore on Agency*, 380, 385.

5. The jury erred in admitting the demand pleaded in compensation. There is no evidence, that plaintiff ever accepted the draft drawn on him, or agreed to pay the notes pleaded in compensation. The judgment of the court *a qua* ought to be amended in this respect.

Bradford, for the defendants and appellants.

1. The appellants were commission merchants in New-Orleans, and as such were the agents of the appellee. An agent can act by a sub-agent, he being answerable for the acts of his sub-agent, to his principal.*

2. In holding and finally disposing of the cotton of the appellee, the appellants used all the care and deligence, which "prudent men" would have been required to have used, to get the best price therefor, which the market would afford.

3. The appellee being the debtor of the appellants, they were justified in making sale of his cotton, after waiting a reasonable time for a rise in the market, to meet the views of their principal.

4. The appellants held on to the cotton, as long as there was reasonable ground to hope for an improvement in the price, and it was incurring continual expense for storage.

The counsel cited to the court, in support of the foregoing points, the following cases from Martin's Reports: *Weems* vs. *M'Micken*, 7 *Martin*, 54. *Young* vs. *M'Laughlin et als. Ibid.* 628. *Noble* vs. *M'Micken*, 9 *Martin*, 188. *Madeira et als* vs. *Townsley et als*, 12 *Martin*, 84.

Martin, J., delivered the opinion of the court.

The sole question which this case presents, is whether a commission merchant, who has sold cotton below the *limited price*, is bound in every case to account for it, at *that price*. Livermore, in his valuable treatise on agency, is said to have laid down the broad principle, that a factor who sells below the limited price, is chargeable with the difference between the price he sold at, and that limited by the owner. *Livermore on Agency*, Baltimore edition, 1 vol. 380, 384.* A copy

*Under the head of "the form of action, which the principal may maintain against his agent, for *nonfeasance, misfeasance, or malfeasance*," *Mr. Livermore*, in his Treatise on Agency, Baltimore edition, at page 384, says:

"As to the general question, I should suppose, that where the factor is positively ordered not to sell the goods under a certain price, his selling

of this edition of that work, is not within our reach at this place, and the passage cited, has been looked for in vain in the Boston edition, which is the only copy to which we have been able to have access. That this rule is the proper one in most cases, we have no hesitation to admit, but we are equally ready to say, that in some cases, the owner of the goods may justly contend, that this rule affords him but an inadequate satisfaction, while we allow the factor may insist, that it mulcts him in excessive damages, and consequently condemns him to pay damages, when the owner is not entitled to any.

A has a plantation, which is the ancient family seat, and which he estimates at a price, much above the sum that he may reasonably accept. It is the price of affection. At his departure, he directs his agent to sell it, but not below that price, which is the only one that affords him a sufficient inducement, to part with the property, the sale of which, necessity and the situation of his affairs does not demand. The agent is induced, by the desire of obtaining his commissions, or the use of the money, to sell at a good price, but below the limit imposed by the principal. This is perhaps a case, to which the rule invoked from Livermore is applicable, in which the measure of damages, is the difference between the two prices.

them for less, is as much a tortious conversion, as if he had given them away; for though the principal has given him an authority, which, as far as third persons are concerned, will not be affected, by his private instructions; yet as between the principal and factor, it is the same as if he had given no authority, when the limits of the authority have been exceeded, and no discretion was left with the factor. If, as Mr. Justice LAWRENCE seems to think, an action for money had and received, be the principal's only remedy, there certainly would be no use in limiting the factor as to price; since in this action the plaintiff would affirm the sale, and the money actually produced by the sale of the goods, would be all that he could recover. Even if the factor has sold the goods for less than the market price, the principal must submit to the loss, unless he can maintain some other action more favorable to him than this. Nor is the action of trover such as to afford him complete satisfaction. When the price at which goods are to be sold is limited by the instructions given to the factor, these instructions have reference to a certain state of the market. They are not intended to guard

During the invasion of this state by the enemy, in the winter of 1814–15, cotton fell to *six cents*. After the peace, it gradually rose to *thirty*. If during the seige of New-Orleans, a factor had received cotton, with directions not to sell under *six cents*, and after peace was proclaimed, had sold it for *five cents*, while fifteen or twenty cents per pound might have been obtained, the owner of the cotton might have well contended, that his case was one in which Livermore's rule afforded but an inadequate measure of damages: As the object of the limitation, was to fix a *minimum* price, not to absolve the factor from the obligation of consulting his principal's interest, by selling for the highest price he could obtain.

In the case of a factor, who had sold below the limited price, but who could show that this price was so extravagant, that neither at the time of the sale, or at any period since, it could be obtained: As if after sales at thirty cents, in 1815, a planter in 1816, had sent his crop to market, with directions not to sell under that price, and the factor having sold for twenty cents, it appearing that this was the highest price, that could be obtained at the time of the sale, or at any period between that and the time of instituting suit, the factor

against a sale for less than the current market price, at the time of making the sale; for this is an event not contemplated by the principal, nor is it of frequent occurrence. The object of the principal is to hold the goods, until a favorable state of the market renders it expedient to dispose of them. Of this he is competent to judge; and it is the duty of the factor to conform to his directions; and he is answerable for violating them. But if the principal has directed the factor not to sell the article for less than five dollars, and the factor sells it for four dollars, which is the current market price at the time; an action of trover will not afford satisfaction; for in trover the rule is, that the plaintiff is entitled to damages equal to the value of the article converted, at the time of the conversion. This value is not to be estimated according to the notion the plaintiff may have of it, nor with reference to the state of the market at another time; but must be calculated according to the actual state of the market, at the time of sale. A special action on the case, alleging the *gravamen*, either as a breach of promise, or a breach of duty, would therefore be advisable; and in this action I apprehend the plaintiff would be entitled to recover, not only the amount for which the goods sold, but also the difference between that amount and the price limited." REPORTER.

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might well contend, that the difference of the price of sale, and the highest price obtainable since, afforded the just measure of damages, while Livermore's rule subjected him to excessive damages.

If in the preceding case, the factor had been drawn on, and accepted drafts for the full amount of the value of the cotton, and showed that the additional cents on the price, were not to be obtained, for even a year after he made the sale; that the protest of the drafts, the interest on money obtained from brokers to redeem them, the storage of the cotton, and its protection from the danger of fire, would all amount to a considerable sum, and render a sale advantageous, although below the limited price, and show that it was beneficial rather than detrimental to the interests of the principal; it is clear the rule invoked would subject the agent to damages, in a case where he was not liable to any.

A mandatory is not considered to have exceeded his authority, when he has fulfilled the trust confided to him in a manner more advantageous to his principal than that expressed in his appointment.

The circumstance of the factor being a creditor of the consignor or owner, and the necessity of his advances being covered, will not, of itself, justify a sale below the limited price.

So where twenty bales of cotton were consigned and limited to be sold for nine and a half cents, *or more*, and without further instructions, the factor or agent sells at seven and eight and a half

The counsel for the plaintiff and appellee, has referred us to the articles 1928, 2978 and 2980 of the *Louisiana Code*, in support of the rule for which he contends. The first of these articles does not appear to this court, to have any bearing on the question under consideration. The next declares, that the attorney who exceeds his authority, is personally liable, and bound by the contract; and the last consecrates the principle which we think ought to govern this case. It provides, that the mandatory is not considered to have exceeded his authority, when he has fulfilled the trust confided to him, in a manner more advantageous to the principal than that expressed in his appointment.

We have also been referred to authorities found in 1 *Mass. Reports*, 57, 254 *and* 288, and to *Pothier on Obligations*, 93 *and* 98. These authorities, as far as we have been able to examine them, do not in the opinion of this court, support the principle, in favor of which they are invoked, and to the extent contended for by the appellee.

The appellants' counsel has presented, as a ground of justification, in behalf of a sale made below the limited price, the circumstance of their being creditors of their principal, and the necessity of their advances being covered. But this justi-

fication cannot, in our opinion, be admitted. The record shows the defendants and appellants have proved, that a higher price than that at which they sold the plaintiff's cotton, could not have been obtained. It does not appear, that at any time between the sale of the cotton, and the inception of this suit, that cotton sold higher.

We therefore conclude, that on the evidence before them, the jury erred in applying the rule contended for by the plaintiff's counsel in this case. But we think justice requires that the plaintiff should have an opportunity of showing, that he was really injured by the sale, being unwilling to pronounce against him, in direct opposition to the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled, avoided and reversed; that the verdict be set aside, and the cause remanded for a new trial; the plaintiff and appellee paying costs in this court.

cents per pound, and it is proved that a higher price than that at which the cotton was sold could not be obtained; and when, it also, appears that this was the highest market price obtainable at any time between the sale and the inception of suit, the price at which the cotton actually sold, is all the principal or owner can recover.

DYER *vs.* SEALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the question is presented, whether a workman who sues on a specific contract for work and labor, can give evidence of the work *really* done, and recover its value, although the job was not completed according to contract, when the employer received the work in an imperfect state, and when sued on the contract, demands damages in reconvention for delay in doing the work, and for its not being done in a workmanlike manner? *Held*, that this case is similar to that of *Loreau* vs. *Declouet*, 3 *La. Reports*, 1; and that the evidence is admissible, and the employer, having received the work, is bound to pay the value in the condition it is delivered.

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The plea in reconvention, authorises the plaintiff to give in evidence the value of the work done for which he sues, to repel the demand for damages against him for the non-performance of his contract.

Where the amount found by the jury was not liquidated at the inception of the suit, *interest* is not allowable by law. The law does not allow interest on unliquidated sums.

Where the verdict and judgment allows interest on an unliquidated sum, the appellee cannot avoid a reversal of the judgment and payment of costs, by filing in the Supreme Court a *remittitur* of the interest so allowed.

The plaintiff alleges, he entered into a written contract with the defendant, to build for him a cotton gin, for which the latter bound himself to pay him the sum of five hundred and fifty dollars. He further alleges, he has performed his part of the contract according to the terms thereof, and completed the gin within the time limited; and that the defendant refuses to pay him. He, therefore, prays judgment for the sum of five hundred and fifty dollars and costs.

The defendant pleads a general denial; admits, and annexes to his answer the written contract to build the gin, but expressly avers that the plaintiff, after commencing the work quit it soon after, and left the country, against the consent and remonstrances of this defendant; that by reason of the misconduct and failure of the plaintiff to build his gin in time for his crop, he has sustained damages to the amount of five hundred and fifty dollars; and that the plaintiff is further indebted to him for various articles furnished, according to an annexed account, amounting to four hundred and nine dollars and twenty-five cents, making in all the sum of nine hundred and fifty-nine dollars; for which he prays judgment against the plaintiff in reconvention.

The plaintiff sued on his written contract, in which he bound himself to build the gin and gin-house for the defendant, by the 1st of October, 1833, unless prevented by sickness, in which case he was to have longer time. The evidence shows, the work was badly done, and the gin not entirely completed. The defendant attempted to gin his cotton on it, but he had

to employ a person to finish and fix the press, before he could press the cotton after it was ginned. The whole evidence showed, the gin was not completed according to the contract. The account of defendant, annexed to his answer, was proved, with the exception of some items, which were stated to be charged too high.

The jury returned a verdict for the plaintiff, in the sum of three hundred and fifty-six dollars, without finding any thing on the plea in reconvention.

The defendant's counsel moved for a new trial, on the following grounds:

1. The jury erred in finding a verdict for the value of the work and labor done, when the suit was brought on a special contract.

2. The verdict is contrary to law and evidence, in not finding or allowing any thing on the plea in reconvention.

3. There was no proof of the value of the work done by the plaintiff.

The motion for a new trial was overruled, and judgment rendered in conformity to the verdict. The defendant appealed.

Where the question is presented whether a workman who sues on a specific contract for work and labor, can give evidence of the work *really* done and recover its value, although the job was not completed according to contract, when the employer received the work in an imperfect state, and when sued on the contract, demands damages in reconvention for delay in doing the work and for its not being done in a workmanlike manner? *Held*, that

Lawson, for the plaintiff.

Muse, for the defendant and appellant.

Bullard, J., delivered the opinion of the court.

The appellant relies for a reversal of the judgment on five points, filed in the record.

The three first may be considered together, as presenting to the court the question, whether a workman who sues on a specific contract for work and labor, can give evidence of the work really done, and recover its value, although the job was not completed according to contract, when the employer received the work in an unfinished state, and when sued on the contract demands damages in reconvention, for delay in doing the work and for its not having been done in a workmanlike manner.

this case is similar to that of *Loreau* vs. *Declouet*, 3 *La. Reports* 1; and that the evidence is admissible and the employer having received the work, is bound to pay the value in the condition it is delivered.

The plea in reconvention authorises the plaintiff to give in evidence the value of the work done for which he sues, to repel the demand for damages against him for non-performance of his contract.

Where the amount found by the jury was not liquidated at the inception of the suit, *interest* is not allowable by law. The law does not allow interest on unliquidated sums.

Where the verdict and judgment allows interest on an unliquidated sum, the appellee cannot avoid a reversal of the judgment and payment of costs, by filing in the Supreme Court a *remittitur* of the interest so allowed.

This case is similar, in its essential features, to that of Loreau *vs.* Declouet, 3 *La. Reports*, 1; in which this court held, that in commutation contracts, when the reciprocal obligations are to be performed at the same time or one immediately after the other, if one party goes on to perform his part but does not complete it, as agreed on, and the other receives the thing contracted for, he is bound to pay the value in the condition it is delivered.

The plea in reconvention, authorised the plaintiff to give in evidence the value of the work done, to repel the demand for damages against him for the non-performance of his contract. The jury tried the whole case, and after allowing to the defendant about two hundred dollars, rendered a verdict in favor of the plaintiff, for the balance.

The fourth point made by the counsel for the appellant, is that the verdict of the jury on the plea of reconvention, is contrary to law and evidence. It is urged, that a greater amount of damages was proved, than has been allowed by the jury. One witness, it is true, stated as his opinion that the defendant had suffered greater damage in the loss of an early market, and the fall of price. But the jury was not bound to adopt the opinion of the witness, which may have been formed on taking into view remote consequences which could not have entered into the contemplation of the parties when the contract was made. The jury took into view the limited amount of crop to be ginned, and the delay which occurred, and formed their opinion according to the facts proved on the trial. We are not enabled to say, that their verdict has done evident injustice to the defendant.

The last point appears to us well taken. The amount found by the jury was not liquidated at the inception of the suit, and interest is not by law to be allowed on unliquidated sums. The appellee endeavors to obviate this objection, by filing in this court a *remittitur* as to the interest allowed by the judgment. We are of opinion, that this cannot be done. This court must pronounce on the judgment as it was rendered, independently of any modification of it by one of the parties pending the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that the plaintiff recover of the defendant and appellant the sum of three hundred and fifty-six dollars, with costs in the District Court; those of the appeal to be paid by the plaintiff and appellee.

MARY, f. w. c. *vs.* MORRIS ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In a conflict of laws between two states, where a testator in Georgia bequeathed to certain of his slaves their freedom, to take effect five years after his death, and before the expiration of the five years the testamentary executor brings the slaves to Louisiana, and it is shown that at the time of the *bequest* of freedom, the laws of Georgia prohibited the manumission of slaves, except by application to the legislature: *Held*, that the bequest in the will being prohibited by the laws of the state where it was made, *is null and void.*

The bequest of liberty to slaves which is made in contravention of the law of a state, enacted for the security of the public peace, and good order of the community, is absolutely null and void; and such slaves do not *ipso facto* become free under the will, on being brought to this state, where slavery is tolerated, but in which slaves may be manumitted by will.

In a suit for freedom, when the question is *libera vel non*, and the plaintiff, being, from her color and the possession of the defendant, presumed to be a slave, the burden of proving freedom devolves on the plaintiff.

This is an action in which the plaintiff claims her freedom. She alleges that she was held in slavery in 1809, in the state of Georgia, by one John Marshall, who in a clause of his will made that year, provided that she should be free on

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the first day of January, 1815. The following is the clause under which she claims her freedom:

"Conscientiously believing that civil and religious liberty is the natural right of all men, it is my will, that Jude and her two children, *Mary* and Ellender, with all she may have, and William, be put into the possession of my daughter Merriam Morris, on the first day of January next (1810), to serve her for the space of five years from said date, *and only five years:* then, it is my will, that the said Jude and the above named servants be set free, and they are hereby declared free after serving *said term of time.*" The will is dated "17th March, 1809."

That the said Merriam Morris never informed her of her freedom under said will, but her and her husband brought her to the state of Louisiana, and held her in slavery until the death of the husband, Gerard Morris; and that she was sold by the administrator of Morris's estate, by public act passed before a notary public in the parish of St. Helena, to Jerry Morris, who died in the parish of East Baton Rouge, and that she and her five children are now detained *in slavery* by the defendant, Leroy C. Morris. She prays for judgment, declaring herself and her five children to be free persons of color; that the succession of Morris be decreed to pay her two thousand dollars in damages, for the illegal detention of her and her children in slavery; and fearing she may be taken from the jurisdiction of the court, she prays that she and her children be sequestered.

The defendant pleaded a general denial; and averred that the clause of the will under which the plaintiff claims her freedom, is utterly null and void by the laws of Georgia; that by the laws of that state, a slave could be made free only by legislative act on the application of the owner.

The defendant, in a supplemental answer, alleged that Mary and her two children, Gerard and William, were adjudicated to Jerry Morris, whose estate he administers, for the price of nine hundred dollars, at the probate sale of the succession of Gerard Morris. He cites the heirs of G. Morris in warranty.

The warrantors answered, denying the plaintiff's demand, and also denying that they were liable in warranty, &c.

The plaintiff proved the allegations in her petition, leaving the authority to be set free under the laws of Georgia, to be contested.

The defendants introduced in evidence an authenticated copy of the laws of Georgia, passed in 1801, relating to the manumission of slaves, and also prohibiting it in any other mode, under a heavy penalty, than by application to the legislature of the state.

The will under which the plaintiff claims, was duly admitted to probate in Georgia, and proved and admitted to record in this state.

The district judge was of opinion, that slaves, being passive in their situation and character, it was the duty of the executor to see the will executed agreeably to the intention of the testator, which he viewed in the light of a contract for freedom; that there could be no doubt under the laws of this state, where she now seeks to enforce it, she is entitled to her freedom: and it also appears, that since the date when she was entitled to her freedom, she has had five children, now living, who are also entitled to their freedom. Judgment was rendered, declaring Mary and her five children free and emancipated. Judgment was also rendered against the warrantors for the price which these persons sold for at probate sale, viz: nine hundred dollars, &c.

The warrantors appealed. In the answer to the appeal by the defendant, administrator of L. C. Morris, &c. he prays the judgment to be corrected.

1. He joins the warrantors in praying for a reversal of the judgment.

2. That it may be corrected, by allowing interest on the price of said slaves, paid to the warrantors, &c.

Brunot, for the plaintiff.

R. & A. N. Ogden, contra.

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Mathews, J., delivered the opinion of the court.

In this case, the plaintiff claims her freedom under the will of a certain John Marshall, of the state of Georgia.

The answer denies the right of freedom claimed, and alleges that the testator could not, according to the laws of Georgia, manumit his slaves; all owners of this kind of property being prohibited by the statutes of that state, under severe penalties, from executing any act of manumission or in any other manner giving freedom to their slaves, without an act of the legislature authorising such freedom. Judgment was rendered in favor of the plaintiff in the court below, from which the defendant appealed.

In a conflict of laws between two states, where a testator in Georgia, bequeathed to certain of his slaves their freedom, to take effect five years after his death, and before the expiration of the five years, the testamentary executor brings the slaves to Louisiana, and it is shown that at the time of the *bequest* of freedom the laws of Georgia prohibited the manumission of slaves, except by application to the legislature: Held, that the *bequest* in the will, being prohibited by the laws of the state where it was made, is *null and void.*

The bequest of liberty to slaves, which is made in contravention of the law of a state, enacted for the security of the public peace, and good order of the community, is absolutely null and void; and such slaves do not *ipso facto* become free un-

The only question which the cause presents, arises out of a conflict between the laws of the state where the testator resided before his death, and where his succession was opened by probate of the will, and the bequest of freedom in favor of certain slaves named in said will, amongst which was the plaintiff.

These laws are prohibitory, and had relation to the peace and good order of the community, for the government of which they were enacted. They inhibit absolutely all owners of slaves within the limits of the state, from doing any act giving liberty to their slaves, and prohibit them from granting freedom in any manner whatsoever, except by application to the legislature for that purpose. The law particularly applicable to the present case, was enacted in 1801. The will and its probate bears date in 1809. The fourth clause of this will purports to give freedom to the plaintiff absolutely, after the expiration of five years from the death of the testator. This bequest was made in contravention of a prohibitory law; it was in derogation of a law made in relation to the peace and good order of the community, and was, consequently, absolutely null and void in the state where the law was in force. The plaintiff remained a slave so long as her owner kept her in that state, and certainly could not *ipso facto* become free by being removed to this, wherein slavery is also tolerated.

der the will, on being brought to this state, where slavery is tolerated, but in which, slaves may be manumitted by will.

In a suit for freedom, when the question is *libera vel non*, and the plaintiff being from her color and the possession of the defendant, presumed to be a a slave, the burden of proving freedom, devolves on the plaintiff.

The judgment of the court below, seems to be based on the ground of negligence in the testamentary executors, in not applying to the legislature of Georgia for leave to emancipate the slaves who were freed by the will of John Marshall. This was not a duty imposed on them by express terms of the will, and even if it had been, it is by no means clear that their conduct could in any manner affect the rights which vested in Mrs. Morris, the daughter of the testator, under his will; and by the laws of the state of Georgia, considering the donation of liberty by the testament as absolutely void.

The evidence shows, that the defendant claims title as derived from her. The main question in the case is, in relation to the plaintiff, *libera vel non*. Being from color and actual possession of the defendant, presumed to be a slave, the burden of proving her freedom devolved on her; in which we are of opinion she has failed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court rendered in this case, against both the defendant and his warrantors, be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the defendant be maintained and quieted in his possession of the plaintiff as a slave, and her children, and that he recover the costs of this suit in both courts.

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vs.
LORENTE ET ALS.

REGILLO & BRYAN *vs.* LORENTE ET ALS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where a suit is brought against A, for illegally retaining possession of a note, and against B, the obligor, included in the same suit, and judgment is asked against the first, to compel a surrender or payment of the note, and the latter also for its amount; the causes of action are different, and judgment may well be taken against the first, while the case is continued as to the latter.

In an action against A for a *tort*, and B on a contract, it is not a joint action, although both parties were brought before the court at once, in the same suit.

The plaintiffs sue as the administrators of the succession of Policarpio Regillo, which was opened in the parish of East Feliciana, on a note of one thousand one hundred and seventy-one dollars, dated 7th January, 1832, and executed by the firm of John Crenan & Co., composed of John Crenan and John Swift; that Swift is the surviving partner of said firm, residing in the parish of West Feliciana, and charged with its liquidation; that Madame Lorente, residing in East Baton Rouge, has possession of said note, and claims it as her own, by an assignment from the deceased payee; they allege, that she has no right or title to the said note, and that it has never been legally assigned to her, but belongs to the succession which they administer. They pray judgment against the defendant Lorente, for the restoration of the note, or its amount; and against Swift, as the surviving obligor in the note, for the sum of one thousand one hundred and seventy-one dollars, with interest thereon, at ten per cent. per annum, from the first of January, 1831, until paid.

Swift appeared and answered, admitting the execution of the note, and that he was willing to pay it, when it was decided to whom he was to make payment; and prayed for general relief, &c.

Madame Lorente failed to appear, and judgment was taken against her by default, and no answer having been put in, final judgment was rendered against her alone, as follows, to wit: "In this case, judgment by default having been entered, and full three days having elapsed, the plaintiff proceeded to the proof of the allegations in the petition, and having established thereby, satisfactory evidence, and the court considering that they are legally entitled to recover, in manner and form, against Madame Lorente, as they have prayed," &c. She was then decreed to deliver up the note in question, to the clerk, within ten days after notification of judgment, for the benefit of the plaintiffs; and in default thereof, to pay the amount thereof and interest. At the trial, the death of Swift one of the defendants, being suggested, Alexander Barrow his executor, was ordered to be made party defendant in his stead, and the cause continued for his answer.

The counsel for Madame Lorente, came into court after final judgment was rendered, but before signing it, and moved for a new trial, on the following grounds:

1. The final judgment was prematurely taken. 2. The judgment of the court is not supported by the evidence adduced. 3. Judgment could not be rendered against one of the defendants alone, they being sued jointly. 4. Judgment is contrary to law and evidence.

The district judge considered, that there was no law, authorising a motion for a new trial, after a judgment by default had been made final; at any rate it was a motion addressed to the sound discretion of the court. It was overruled, and the defendant Lorente appealed.

Turner, for the plaintiff.

T. G. & M. Morgan, for defendant and appellant, made the following assignment of errors, as appearing on the face of the record.

1. The plaintiffs sued as administrators, and did not give in evidence the letters of administration, or any evidence to show that they were in fact administrators.

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2. It appears from an inspection of the record, that there was no evidence, showing the property of the administrators in the note sued on.

3. It was not sufficient to show, merely that the defendant was in possession of the note in suit, but they were bound to show title in themselves, before they could recover judgment.

4. The death of Swift had been suggested by the plaintiffs, and no proceeding could be legally had against Madame Lorente, until Swift's executor had been made party to the suit; the action being joint, and not joint and several.

Bullard, J., delivered the opinion of the court.

This case is before us, on assignment of error. The two first assignments relate to matters, which might have been cured by evidence, in the court below, and consequently cannot be examined in this court, without a statement of facts. The third error assigned is, that the death of Swift had been suggested by the plaintiffs, and no proceedings could be had legally against Lorente, until Swift's executor had been made party to the suit, the action being a joint one, and not joint and several.

Where a suit is brought against A, for illegally retaining possession of a note, and against B, the obligor, included in the same suit; and judgment is asked against the first to compel a surrender, or payment of the note, and the latter also for its amount, the causes of action are different, and judgment may well be taken against the first, while the case is continued as to the latter.

In an action against A for a *tort*, and B on a contract, it is not a joint action, although both parties were brought before the court at once in the same suit.

It does not appear to us the court erred. The action was against Lorente, for illegally retaining possession of the note, and against Swift the obligor. The judgment asked against the first was, that she should surrender the note to the plaintiffs, the latter, that he should pay it to them. The causes of action were different, and judgment in favor of Lorente, would necessarily preclude the recovery against Swift, because it would show that the note belonged to her, and not the plaintiff. The action against the one, was for a *tort*; against the other, on a contract. It was not therefore a joint action, although both parties were brought before the court at once. The question, which of the two was entitled to possession of the note, might well be contested, without the presence of the obligor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

KEYS ET ALS. *vs* POWELL AND WIFE.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where defendants claim title to certain property under an act *sous seing privé*, dated on a particular day in Baton Rouge, and the plaintiffs show, that *on that very day*, in another state, one hundred and seventy miles distant, the same vendor executed a power of attorney before a justice of the peace, *to the same vendee: Held*, that this fact, connected with the circumstance that this person, executing the two acts, had at that time left the state to avoid a criminal prosecution, will be considered such violent presumption of forgery and perjury, as will require the verdict to be set aside, and the cause remanded for a new trial.

The plaintiffs sue as the surviving wife and children, and the forced heirs and legal representatives, of James Sides, deceased. They allege, that in 1819, James Sides purchased a negro woman for one thousand dollars, as community property, who has since had two children, Peggy and Alfred, about ten and twelve years of age, which now belong to them as the surviving wife and children of the deceased; that one Hiram Powell and Charity Keys, his wife, have taken possession of said slaves, and claim them as their own. They pray judgment that the two slaves be restored to them, or their value, alleged to be worth four hundred dollars each; and that there is danger of the defendants running said slaves out of the state: they further pray, that they be sequestered, &c.

Powell and wife pleaded a general denial; they deny that Dorothy Keys, one of the plaintiffs, was the wife of James Sides, deceased; they deny that Susan Shelton and Susan Sides, the other plaintiffs, are heirs of James Sides, deceased; they aver, that Charity Keys, wife of defendant, inherited the negro woman Dinah and her two children, Peggy and Alfred, from her brother, Job Keys, as appears from his will; that Job Keys purchased the said slaves from James Sides in his life-time; that the said Dorothy Keys acknowledged after the said sale that the full price had been paid for said slaves,

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and that she was satisfied with the terms of sale; they then plead the prescription of five and ten years against the plaintiff's demand.

The evidence shows, that James Sides purchased the slave Dinah by public act, passed before the parish judge of East Baton Rouge, dated the 10th August, 1819, for the price of one thousand dollars; that on the 28th February, 1825, he sold said slave, then about twenty-eight years old, and her two children, Peggy and Alfred, aged four and three years, together with another slave, to Job Keys, for one thousand and two hundred dollars, by act *sous seing privé*, but recorded on the 19th August, 1825, at the request of the vendee. In this act, James Sides, the vendor signed the act of sale by making his mark, in the presence of two witnesses.

In 1827, Job Keys made his will, and bequeathed the slave Dinah and her children, Peggy and Alfred, to his sister Charity Keys, the wife of defendant, Powell.

The defendants produced in evidence, a mortgage on the slaves in contest, executed by Sides in October, 1824, to secure the payment to Job Keys, the sum of eight hundred dollars; also the answer of Joseph Hickman, a witness to the bill of sale from Sides to Keys, taken to interrogatories, wherein he declares he signed the bill of sale as a witness, and saw James Sides make his mark to his signature thereto. The act of sale purports to have been made in East Baton Rouge, on the day it is signed, to wit, 28th February, 1825.

The plaintiffs offered in evidence a power of attorney, signed by James Sides, in Copiah county, in the state of Mississippi, dated 28th February, 1825, the same day on which the act of sale purports to be executed, constituting the same Job Keys his attorney in fact, to dispose of his property in Louisiana; also an act of sale of two tracts of land belonging to Sides, to James Mather, dated 17th January, 1826, by said Keys as attorney in fact; and an act of sale of Mather to Keys of two tracts of land, in April, 1827; and also the tableau of distribution of the estate of Job Keys, made in 1827, on which Dinah and her two children, Peggy and Alfred, are put down at seven hundred dollars.

The plaintiff proved by witnesses the marriage of James Sides and Dorothy Keys, and that Susan Shelton and Susan Sides, the other two plaintiffs, are their children.

Hawes, a witness for the plaintiff swears, he had a conversation with Job Keys in the spring of 1827, who said Sides had been in the parish the evening before, and was much distressed for money: "Keys further stated, Sides was coming over to give him a *bill of sale, or had already made him a sale of the negroes*," &c. The bill of sale produced in evidence, bears date two years before this.

Watts, a witness for defendants, says Job Keys had the negroes in possession a year before his death. He died in 1827. Witness has had the negroes in possession since, as his executor; he delivered them to him.

The jury returned a verdict for the defendants, and judgment was rendered in conformity thereto, from which the plaintiffs appealed.

Elam, for the plaintiffs, relied on the presumption of forgery of defendants' title, arising from the fact of its being executed on the day, which the evidence shows, the vendor was in another state, nearly two hundred miles off.

T. G. & M. Morgan, contra.

Bullard, J., delivered the opinion of the court.

The plaintiffs alleging that they are the widow and heirs of James Sides, deceased, set up title to certain slaves in possession of the defendants, and sue for their recovery. The defendants derive title to them under the last will and testament of Job Keys, who, they allege, purchased them in his life-time, of the ancestor of the plaintiffs. The cause was tried by a jury in the court below, who found a verdict in favor of the defendants, and the plaintiffs appealed.

Where defendants claim title to certain property under an act *sous seing privé*, dated on a particular day in Baton Rouge, and the plaintiffs show, *that on that very day*, in another state, 170 miles distant, the same vendor executed a power of attorney, before a justice of

The sale from Sides to Keys, which was given in evidence, is a private act, under the ordinary mark of the vendor. Its execution is sworn to by one of the subscribing witnesses. It purports to have been executed in the parish of East Baton

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the peace, *to the same vendee: Held*, that this fact, connected with the circumstance, that this person executing the two acts, had at that time left the state to avoid a criminal prosecution, will be considered such violent presumption of forgery and perjury, as will require the verdict to be set aside and the cause remanded for a new trial.

Rouge, on the 28th of February, 1825. To rebut this evidence the plaintiff exhibited to the jury, a power of attorney executed by Sides, by which he constituted the same Job Keys his attorney in fact, with power to sell and dispose of any property of the principal, in the parish of East Baton Rouge, bearing the same identical date, and executed and acknowledged before a justice of the peace, in the county of Copiah, in the state of Mississippi, at a distance of one hundred and seventy miles from Baton Rouge. This power of attorney was accepted by Job Keys, who proceeded to act under it, and actually disposed of certain property of the principal. In addition to this, it is shown that Sides had left the State, to avoid a criminal prosecution, had confided his property to Keys, and never returned except on one occasion, and then clandestinely. These circumstances raise such violent presumption of forgery and perjury, the two instruments seem so utterly inconsistent with each other, the one appearing from the evidence before us, to render it impossible that the other can be genuine, that we feel ourselves bound to set aside the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled and reversed, and that the case be remanded for a new trial, and that the defendants and appellees pay the costs of the appeal.

BRADFORD'S HEIRS vs. CLARK.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

In an action of revendication, for the recovery of a slave, by the heirs, as forming a part of the succession of their ancestor, against the defendant, who holds the slave by written title from said ancestor, executed in his life time, parole evidence is *inadmissible* to prove, that the defendant directed the slave in question, to be inventoried as part of said succession, in order to make out plaintiff's title.

Where parole evidence is offered, with a view to defeat the defendant's written title to a slave, it should be rejected as *inadmissible*.

There is no distinction as to the parties to them, between public and private acts, not recorded in relation to the title to slaves. Between the parties to a contract, an act under private signature, has the same force as a notarial act. They differ as to the mode of proof.

An action of rescission, for lesion beyond moiety, does not lie in relation to the sale of slaves.

Where fraud and simulation, or lesion, are not alleged, a judgment disregarding a written sale of a slave, will be declared erroneous, and be annulled and reversed.

Under the prayer for general relief, when the evidence shows an agreement of the defendant, to pay a certain sum, as the balance of the price of a slave, the court will consider itself authorised to give effect to the agreement, and terminate the controversy between the parties, although not alleged or asked for in the petition.

This is an action of revendication of a slave, alleged to be illegally possessed and claimed by the defendant. The plaintiffs are the heirs and legal representatives of Nathan Bradford, deceased. They allege, that at the death of their ancestor, a negro man slave, named Wilson, belonged to his succession, worth seven hundred dollars; that said slave was directed by defendant, to be put in the inventory of said succession, at the death of Nathan Bradford, in 1825 or 1826; that since then he has taken possession of this slave, and pretends to hold him, in virtue of a bill of sale from the

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deceased, in his life-time, which they allege was made without consideration, and that the slave was never delivered to the defendant, in pursuance thereof; that this bill of sale is an act under private signature, and was never recorded; that since Bradford's death, the defendant entered into a verbal agreement with the widow of the deceased, to take the slave at seven hundred dollars, by being allowed a claim of three hundred dollars against the estate, in payment, and giving the heirs of Bradford, a negro woman slave, worth four hundred dollars; they further allege, that they are the legal owners of said slave, and that the defendant has had him in possession, ever since January, 1825, and that his hire is worth one hundred and fifty dollars per annum. They pray for judgment, decreeing the delivery to them, of said slave, and for the amount of hire at the above rate.

The defendant excepted to the form of action, and averred, that according to the plaintiffs' own showing, it cannot be maintained for the revendication of a slave, &c. On the merits, he pleaded the general issue, and that he held the slave in question, by a just and good title. Finally he interposed the plea of prescription.

James Reams, witness for plaintiffs, declares that he drew the bill of sale from N. Bradford to defendant, of the slave Wilson, which is dated the 9th January, 1816, and expresses the sale to be made "*for the small consideration of seven hundred dollars cash paid, &c.* Witness says, he acted at that time, as the overseer of defendant, and that the slave Wilson was present at the time of signing the bill of sale, and was delivered; but that the slave was never put under his care, on the plantation, and was shortly afterwards in the possession of Bradford. There was one hundred dollars in cash paid, at the time of making the sale, but he saw no more.

Leonard Bradford, witness for plaintiffs, states that soon after the death of N. Bradford, understanding the defendant had a title to the slave, called on him to know what was to be done; defendant replied and told him, to have the slave put in the inventory; that the slave ran away soon after, and

the following winter (1824 or 5) witness saw him in possession of the defendant; the latter stated to witness, that he had made an agreement with the widow for the slave, that the estate was owing him three hundred dollars, and he was to pay four hundred dollars more, or give her a woman, worth four hundred dollars. Soon after this the widow died, and the children were put under the care of witness, who is the brother of N. Bradford, deceased. Witness called on defendant to assist in the support of the children, out of this four hundred dollars, which he agreed to do, and gave witness one hundred pounds of coffee, and some small drafts of twenty or thirty dollars.

The slave was not put on the inventory, as it was considered by witness and defendant, that if he was put on the inventory he might be sold, and it would be better for the children, that he should not be sold; that the widow preferred this arrangement, as the boy was difficult to manage, and a woman would be better. Defendant told witness, the reason he did not get the woman for the widow, was that he feared he would not be able to suit her, and that he preferred paying the money; and he never manifested any disposition to pay the four hundred dollars. Witness was curator of the minor children of N. Bradford, and the reason he never called on defendant for further aid, was, that he doubted the title to the slave, being in the defendant.

A bill of exception was taken by defendant's counsel, to the opinion of the court, admitting L. Bradford to be sworn as a witness. 1. That the plaintiffs had alleged a written title from N. Bradford to defendant. 2. That said title had been verified by *Reams*, the first witness called. 3. That plaintiffs' counsel had examined Reams, in relation to one part of the deed; that before the parole evidence was taken down, the written title ought to be read to the jury.

A bill of exception by defendant's counsel, was taken, to the decision of the court, permitting L. Bradford to prove a verbal conversation he had with Mr. Clark, in which the latter directed the slave to be put on the inventory, &c., on the ground that parole evidence could not be given to prove

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title in a slave; also to the second examination in chief, of L. Bradford, on the ground: 1. That this was an action of revendication, and no evidence of lesion could be admitted under the pleadings. 2. That the plaintiff had no right to produce evidence of simulation, fraud or contract, as this was neither an action of nullity, or on a contract for any alleged balance, &c.: And finally, to the refusal of the judge to charge the jury. 1. That in an action of revendication, when an outstanding title is opposed, arising from a sale of plaintiffs' ancestor, the sale must first be set aside by an action of nullity, and that under the pleadings in this case, it is not competent to attack it as fraudulent and simulated. 2. That an action to set aside a sale, as fraudulent, as between the original parties or their heirs, is prescribed in one year, from the time the fraud became known to the parties.

But the judge charged the jury, that there was a distinction between public and private acts, not recorded; that in the former case of public acts, they must be attacked by the direct action of nullity, for fraud or simulation; that private acts could be attacked on the ground of fraud in the present form of action.

The claim for hire was discontinued before the verdict. The jury found the slave to be the property of the plaintiffs. Judgment was rendered confirming the verdict; and after an unsuccessful attempt for a new trial, the defendant appealed.

Bradford, for the plaintiffs.

Ripley, contra.

Bullard, J., delivered the opinion of the court.

The plaintiffs allege, that they are the heirs at law, of Nathan Bradford, deceased, who was at the time of his death, the owner of a slave named Wilson, worth seven hundred dollars. They further allege, that after the decease of their ancestor, the said slave came illegally into the possession of the defendant; that the defendant has a bill of sale for the slave, but that the same was given without consideration, or for less than one-half the value of the slave, and that it is

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In an action of revendication for the recovery of a slave, by the heirs, as forming a part of the succession of their ancestor, against the defendant who holds the slave by written title from said ancestor, executed in his life-time, parol evidence is *inadmissible* to prove that the defendant directed the slave in question to be inventoried as part of said succession, in order to make out plaintiffs' title.

Where parole evidence is offered with a view to defeat the defendant's written title to a slave, it should be rejected as *inadmissible*.

There is no distinction as to the parties to them, between public and private acts not recorded, in relation to the title to slaves. Between the parties to a contract, an act under private signature has the same force as a notarial act. They differ as to the mode of proof.

An action of rescission for lesion, beyond

an act under private signature, and has never been recorded. It is further alleged, that after the death of Bradford, the defendant agreed verbally, to give seven hundred dollars for the slave, by obtaining a credit for three hundred dollars, which he claimed as a debt due him by the estate, and for the balance of four hundred dollars, by conveying to the heirs, a negro woman of that value. They pray judgment for the slave and his services, and for general relief.

The defendant pleaded title in himself, and prescription. The cause was submitted to a jury, whose verdict was in favor of the plaintiffs, and a judgment being rendered thereon, the defendant, after an unsuccessful motion for a new trial, appealed.

The case comes before us, on a statement of facts, and several bills of exception.

One of the bills of exception, upon which the defendant's counsel relies, was taken to the admission of parole evidence, to prove that the defendant directed the slave in question, to be put down on the inventory of the estate of Bradford, as forming a part of the property of the succession. The court allowed the evidence to go to the jury, notwithstanding the objection. We are of opinion that the court erred, and that the evidence was inadmissible. The evidence goes to defeat the title of the defendant, and to vest the property in the estate. Parole evidence of title in slaves, is expressly excluded by the Code, except perhaps in certain cases, of which this is clearly not one.

A second bill of exceptions was taken, to the instruction of the court to the jury. The defendant's counsel asked the court to charge the jury that in an action of revendication, where the defendant sets up a written title, from the ancestor of the plaintiffs, whether under private signature or by authentic act, the sale must be set aside, by direct action of nullity, and that it is not competent under the pleadings in this suit, to attack it as fraudulent or simulated. And that such action between the parties or their heirs, is prescribed by one year. But the court instructed the jury, that there was a distinction

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moiety, does not lie in relation to the sale of slaves.

Where fraud and simulation or lesion are not alleged, a judgment disregarding a written sale of a slave, will be declared erroneous and be annulled and reversed.

Under the prayer for general relief, when the evidence shows an agreement of the defendant to pay a certain sum as the balance of the price of a slave, the court will consider itself authorised to give effect to the agreement, and terminate the controversy between the parties, although not alleged or asked for in the petition.

between public and private acts not recorded; that in cases of public acts, they must be attacked by the direct action of nullity, for fraud or simulation, but that private acts could be attacked for fraud in the present form of action. We are unable to perceive the force of this distinction, or its application to the case now before the court. Between the parties to a contract, an act under private signature, has the same force as a notarial act; they differ only as to the mode of proof. The petitioners admit the existence of the sale, but allege that it was made without any consideration, or for less than half the value of the property. The deed shows the price to be seven hundred dollars, which the vendor acknowledges, had been paid. The petition does not allege fraud, and an action of rescission for lesion beyond moiety, does not lie in relation to the sale of slaves. *Civil Code, p.* 366, *art.* 114.

The record furnishes us with no evidence of fraud or simulation, and the judgment, disregarding the written title of the defendant, is in our opinion erroneous.

The subsequent agreement of the defendant, to pay four hundred dollars, as set up by the plaintiffs in their petition, is proved by evidence admitted without objection. This amounts at least to an acknowledgment on his part, that a part of the original purchase money, is still due to the plaintiffs, and which the defendant avowed his willingness to pay. The evidence shows, that about thirty dollars of that balance was paid. Under the prayer for general relief, we think ourselves authorised, to give effect to this agreement, and to terminate the controversy between the parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled, avoided and reversed; and proceeding to render such judgment, as in our opinion ought to have been given below, it is further ordered and decreed, that the defendant be quieted in his title to the slave Wilson, and that the plaintiffs recover of the defendant, the sum of three hundred and seventy dollars, with costs in the District Court, the costs of the appeal to be paid by the plaintiffs and appellees.

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APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where a party by contract has a right to certain premises, on performance of a condition precedent, and he fails, but enters on the premises in pursuance of his contract, and the adverse party suffers him to remain in possession more than a year, if the latter afterwards enters and takes forcible possession, he will be considered a trespasser, and liable to damages.

Where a person has a right of possession, and suffers his adversary to remain in peaceable possession more than a year, he forfeits his right to a possessory action, and has no remedy left him but the petitory.

The right of possession and actual possession, authorise the possessor to bring an action of trespass, and it is the province of the jury to assess the damages.

The plaintiff alleges he is the owner of a tract or strip of land, between a certain road and a creek, in the parish of East Feliciana, part of which the defendant entered into a written contract to convey to him; that he was in the peaceable possession of the land for more than a year previous to the 7th February, 1832, when the defendant illegally and forcibly took possession of the premises, pulled down the fences and made others, and still retains his illegal possession; that he has sustained damages in consequence of the trespass, and being deprived of making his crop, to the amount of five hundred dollars; for which he prays judgment.

In an amended petition, the plaintiff alleges that the defendant, with the intention of injuring him, pulled down his fences adjoining this piece of land, and left open eighty acres of cleared land, which he was deprived from cultivating, and trespassed on said land by making a road through and over it; that by reason of the said trespasses, he has sustained one thousand dollars damages, and prays judgment therefor.

The defendant pleads the general issue; and avers, that prior to April, 1819, he purchased two hundred and fifty-five acres of land, including the disputed premises, from the

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plaintiff, and has been in possession, and the plaintiff is bound to guaranty the title thereof; that the plaintiff owns a tract adjoining this one, through each of which a public road was established, and it was an object with both parties to have it run in a direct and straight line through their land, and that they obtained an order from the police jury to this effect. The road was to be run and opened at the expense of the parties to this suit. That the plaintiff, in order to acquire a corner of the above tract, of about twenty acres, agreed to do all the work, and entered into a written agreement to this effect; and that it was upon this condition he agreed to convey the said corner of land to the plaintiff, that the plaintiff failed to comply with his engagement, in consequence of which defendant entered peaceably and without violence upon this corner of land; he prays that the agreement to convey it to the plaintiff be cancelled, at the costs of the latter, and that he be dismissed with his costs.

Upon these pleadings, the cause was submitted to a jury, upon the evidence produced by the parties respectively. The plaintiff introduced in evidence the papers of another suit in a possessory action for the same premises, between the same parties, in which he had a verdict. Witnesses were called, who proved the pulling down of fences by the defendant, and the trespasses alleged to be committed and complained of by the plaintiff, to a certain extent. The jury found a verdict for the plaintiff of one hundred and fifty dollars in damages, but omitted to decide on the written contract relative to making the road, &c.

The defendant's counsel moved for a new trial, on the ground that the jury did not pass on the whole case, but found damages only, without deciding on the performance or non-performance of the conditions of the contract between the parties, and which were put at issue by the defendant.

It was in proof, that the plaintiff tendered to the defendant one hundred dollars, in full compensation for the land in contest, who refused to receive it, alleging the plaintiff had not made the road according to contract, and on that ground he refused to receive the tender. The motion for a new trial

was overruled. The district judge gave judgment confirming the verdict, from which the defendant appealed.

Saunders, for the plaintiff.

Turner, for the defendant.

Mathews, J., delivered the opinion of the court.

This is an action of trespass, in which the plaintiff claims remuneration for damages, alleged to have been by him sustained in consequence of the defendant having broken the enclosures of the former by removing the fences on his land, &c. The defendant, in his answer, pleads the general issue, and sets up title to the land on which the trespass is alleged to have been committed, &c. The case was submitted to a jury in the court below, who found a verdict for the plaintiff, and judgment being thereon rendered, the defendant appealed.

The evidence of the cause shows, that the parties were separate owners of two tracts of land adjoining a public road, and that it was found convenient to change the direction of this road, which change had the effect of severing a small portion of the defendant's land from his tract, and leaving it in a situation to be more advantageously occupied by the plaintiff. An agreement was entered into between these proprietors, by which it was stipulated that the defendant sold to the plaintiff that portion of land which fell by the course of the new road on the limit of the tract of the latter. The consideration as the price of the property sold, was one hundred dollars, and the labor and expense of making the new road, which the vendee undertook to make at his own separate charge and expense. A principal allegation in the defence is, that this being a condition precedent, and the plaintiff never having complied with his promise and undertaking, he acquired no title to the premises in dispute. The testimony, in relation to the period or length of time during which the plaintiff was in actual possession of the land sold to him on the conditions above stated, shows that he began

Where a party by contract has a right to certain premises, on performance of a condition precedent, and he fails, but enters on the premises, in pursuance of his contract, and the adverse party suffers him to remain in possession more than *a year*, if the latter afterwards enters and takes forcible possession, he will be considered a trespasser, and liable to damages.

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Where a person has a right of possession and suffers his adversary to remain in peaceable possession more than a year, he forfeits his right to a possessory action, and has no remedy left him but the petitory.

The right of possession and actual possession authorise the possessor to bring an action of trespass, and it is the province of the jury to assess the damages.

to use it as his own, and continued thus to possess it more than one year before the defendant entered, committed the trespass complained of, and took the property from the plaintiff.

Under these circumstances, we do not believe the case properly presents any question of title. So far from the appellant having any right forcibly to enter on, and seize the land in dispute, he had, by the lapse of time during which the appellee was suffered to remain in peaceable possession, forfeited his right to a possessory action, and had no remedy left but the petitory. The right of possession acquired by the plaintiff, and actual possession under the contract, authorise the present suit, which is simply an action of trespass. It was the province of the jury to assess his damages, which appear to us not to be excessive.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs; reserving to the defendant his right, if any he have, to sue for a rescission of the contract of sale, &c.

COONEY'S HEIRS *vs.* CLARK.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

Where heirs claim certain slaves allotted to them in the partition of their ancestor's estate, the *procès verbal* of partition is admissible in evidence, to show title on the part of the claimants.

A partition among heirs of property really belonging to the estate inherited, although not homologated in due time, which is informal and only provisional, gives to each heir a separate, and good and valid title to the property partaken by each, until annulled or changed on the application of those interested in the property of the succession.

Property which belongs to the matrimonial community of acquests and gains, may be seized and sold for the debts of the surviving partner, after the dissolution of the marriage, by the death of one of them, *so far as the interest or one undivided half*, of the survivor is concerned, when no proceedings are had before the levy or seizure to make partition among the heirs.

The plaintiffs are the heirs and legal representatives of John Cooney, deceased. The widow, as tutrix of her two minor children, commenced this action to recover from the defendant two slaves, Lucy and Nelson, who, they allege, belonged to their father in his life-time, as appears by an act of partition between them and their sister Mary M., wife of Vincent Vaughan. The plaintiffs further allege, that the defendant has illegally and unjustly taken possession of said slaves, and refuses to deliver them up. They pray that the defendant be decreed to deliver up said slaves, and twelve dollars per month for their hire, from the 29th of September, 1829, and costs.

The defendant pleaded the general denial; and stated that he purchased said slaves the 16th September, 1829, at sheriff's sale, under execution, issued on a judgment rendered in the suit of John C. Morris *vs.* Mrs. Rowena Cooney, the tutrix of the plaintiffs; that said Morris and said Rowena Cooney are both liable to him in warranty, whom he cites accordingly; and prays that, if judgment be rendered against him, that he have judgment against them *in solido* for the sum of five hundred dollars, which he paid for said slaves, with interest, damages and costs.

Mrs. *R. Cooney* answers to the call in warranty, and says the execution under which the slaves were seized and sold illegally issued, being ordered by the defendant, Clark, himself, and not the plaintiff in execution; that she never pointed out the slaves seized in said execution, or assented to their seizure, for which reasons the sale was illegal, and that the defendant purchased with full notice of its illegality, and derives no title therefrom. In an amended answer, she alleges the sale under execution of the slaves in question is illegal, for want of notice to the defendant therein, to appoint

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an appraiser; that the property did not sell for a sum sufficient to satisfy the mortgages existing on it.

Morris pleaded a general denial to the call in warranty; and in an amended answer avers, he assigned the judgment on which execution issued against said slaves to defendant, Clark, before the issuing thereof.

The evidence shows, that the estate of John Cooney, deceased, was partitioned among his three children, in September, 1828; that lots Nos. 1 and 2 fell to the two minors and plaintiffs in this suit, in which were included the slaves Nelson and Lucy; that the mother, Rowena Cooney, was apppointed tutrix to said minors, in October, 1832, after a second marriage. It also appeared, that Mrs. Rowena Cooney had mortgaged these slaves with others, to secure a debt due by her, of five hundred and five dollars, in April, 1827. Morris obtained judgment against Mrs. R. Cooney, on an obligation signed by her for two hundred ninety-two dollars and twenty-eight cents, in 1827. The negroes were seized and sold under this judgment, the 16th September, 1829. The evidence further showed, that the estate of John Cooney, deceased, was partitioned among his heirs the 25th September, 1828, and that the two slaves in controversy were allotted to the two heirs, who now are the plaintiffs in the present suit.

The jury returned a verdict for the plaintiffs, for one-third of the value of the two negroes claimed, and four dollars per month hire, from the 16th September, 1829; and that Mrs. R. Cooney, as warrantor, is bound to the defendant, Clark, for the purchase money; and find a verdict in favor of Morris, the other warrantor. Judgment was rendered accordingly; but a remittitur having been entered for two-thirds of the purchase money, so that judgment was only rendered against Mrs. R. Cooney, in favor of Clark, for one hundred and sixty-six dollars sixty-six cents and two-thirds, with interest and costs. The plaintiffs appealed.

Turner, for the plaintiffs.

1. The defendant cannot attack the title of Cooney's heirs, to these slaves, or subject them to the payment of his claim against their mother. He should have brought an action of nullity, to set aside the partition.

2. The title under which the plaintiffs claim the slaves, was sufficient in law to entitle them to a recovery against the defendant.

3. The possession of the slaves by the defendant, is *tortious*, and they must be surrendered to the legal owners. In such a case, the *tortious* possessor is bound for the full value of the hire of the slaves.

4. The defendant did not acquire any title to the slaves in contest, by the pretended seizure and sale of them to him, on which he relies.

5. The plaintiffs insist, that they are entitled to recover the slaves in contest, and their hire. The judgment of the District Court must be reversed, and judgment rendered in their favor. They rely on the following authorities. *La. Code*, 1219, 1428. 10 *Martin*, 256. 6 *Martin, N. S.* 324. 5 *Ibid.* 361. 7 *Ibid.* 381. 1 *La. Reports*, 282. 2 *Ibid.* 299.

Ripley & Lawson, for defendants.

Mathews, J., delivered the opinion of the court.

This suit is brought to recover two slaves, named Nelson and Lucy, and described in the petition as the property of two of the children of the plaintiff, who represents them as natural tutrix. They claim as heirs to the succession of their deceased father.

The defendant, in his answer, sets up title under a sheriff's deed, which appears to have been made in pursuance of a sale by execution, wherein the property was seized as belonging to the mother, to satisfy a judgment which had been obtained against her by one Morris, &c. The cause was submitted to a jury in the court below, whose verdict, although not clearly intelligible, appears to be the basis of the judgment of that court; from which the plaintiffs appealed.

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COONEY'S HEIRS vs. CLARK.

Where heirs claim certain slaves allotted to them in the partition of their ancestor's estate, the procès verbal of partition is admissible in evidence, to show title on the part of the claimants.

A partition among heirs of property really belonging to the estate inherited, although not homologated in due time, which is informal, and only provisional, gives to each heir a separate and good and valid title to the property partaken by each, until annulled or charged on the application of those interested in the property of the succession.

The evidence of the case shows, that the slaves now in contest were, during his life-time, in the possession of the father of the plaintiffs, and were at his death left amongst the property of his succession. It does not appear that an inventory of his estate was ever regularly made, or that any partition of the community of acquests and gains presumed by law, was made at any time after the dissolution of the marriage by the death of the husband. The entire property which was left by the husband, seems to have remained in an undivided state, in the possession of his widow and surviving partner, until the 25th of September, 1828; when a provisional partition took place between the plaintiffs and their sister, who is co-heir; the whole number of heirs of the deceased father being three. In the division which was made of the slaves, assumed to be the property of the succession of John Cooney, the ancestor of the appellants, the two slaves in question fell to their lot; one to each of them. The introduction of the *procès verbal* of partition, was excepted to by the defendant; it was, however, admitted in evidence by the court below, and, we are of opinion, properly; but no effect was allowed to it in the charge of the judge *a quo;* to which an exception was taken by the counsel of the plaintiffs.

It appears to us, that a just decision of the case depends mainly on the effect which ought to be given to this evidence of title on the part of the appellants. It does not purport to be a partition of the whole estate of the deceased, being in appearance confined to certain slaves specified by name, and appraised by experts appointed by the judge of probates of the parish, where the succession was opened, the ancestor having died intestate. The principal objections to it are informalities in the proceedings, and want of homologation in due time. It is true that the proceedings do not appear to be clothed with all the formalities, which probably are required by law to give absolute and conclusive effect to them as a final partition. It was made in judicial form, between co-heirs, some of whom were minors, represented by their mother and tutrix; and if the property really belonged to the estate of their father, the partition thus made gave to each heir a separate

Property which belongs to the matrimonial community of acquests and gains may be seized and sold for the debts of the surviving partner after the dissolution of the marriage by the death of one of them, *so far* as the *interest* or one undivided half of the survivor is concerned, when no proceedings are had before the levy or seizure to make partition among the heirs.

title to the property by him partaken, good and valid until annulled, or changed by application of those interested in the property of the succession. See *La. Code, arts.* 1219 *and* 1438.

The principles on which the cause seems to have been decided in the court below, are exhibited in the charge of the judge to the jury. One among them is, that the property in dispute belonged to the matrimonial community of *acquests and gains*, which existed between Mrs. Cooney and her husband, at the time of his death. The presumption of law is as assumed in the charge, and if no proceeding had taken place before the levy of the execution which issued against the property of the surviving partner, her undivided interest presumed to exist, the slaves now sued for might have been legally seized and sold. This presumption, we are of opinion, is outweighed by the partition at which the presumed part owner assisted, and thereby virtually acknowledged the exclusive right to be in the succession of her husband, to the slaves which were divided and partaken as such. Whether these proceedings may be annulled by creditors of the widow, alleging fraud, is a question which we are not called on to determine, in the present suit. According to the pleadings and evidence before us, we are of opinion that the plaintiffs have made out their title, and that the defendant has shown none.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, and that the plaintiffs and appellants do recover from the defendant and appellee, the slaves Nelson and Lucy, named and described in their petition, and also the sum of one hundred dollars per year, as the value of the services of said slaves, from the institution of this suit until they shall be delivered up to the plaintiffs, &c.: and it is further ordered, adjudged and decreed, that the defendant and appellee do recover from Rowena Cooney, called in warranty, the sum of five hundred dollars, the price by him paid in consequence of the sale by the sheriff, with five per cent. interest thereon yearly until paid. All costs of this suit to be paid by the warrantor, &c.

GAYLE'S HEIRS *vs.* WILLIAMS'S ADMINISTRATOR.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF EAST BATON ROUGE.

The neglect or omission to record a judgment within *ten days* after its rendition, under the recording act of March 26, 1813, does not render it a nullity, so as to prevent its having the effect of a legal mortgage, from the date of its registry, when recorded after the lapse of ten days.

Statutes in *pari materia* should be construed together, in order to ascertain the meaning of the legislator.

Prior laws are not repealed by subsequent ones, unless by positive enactment, or clear repugnancy in their respective provisions.

Robert Jones, the administrator of the succession of Doctor William Williams, filed his petition, with a tableau of distribution, of the effects of the succession administered, as an insolvent one: he alleges, that the heirs of said succession are minors, and reside out of the state, and prays that a curator *ad hoc* be appointed to represent them; that Eliza Williams, the widow of the deceased, and residing in the parish, be served with a copy of the petition and citation, and that ten days notice be given, to all whom it may concern, to show cause and make opposition; and in default thereof, that he be allowed to proceed to the payment of the widow and creditors, according to the tableau.

The judge of Probates ordered the appointment of the curator *ad hoc*, and citations and notices, to issue and be served and published.

The administrator set down the net amount of the estate, at two thousand four hundred and seventy-three dollars ninety cents, and allowed the widow in community, one-half thereof, in separate property. The other half, with two sums added, for moneys received on account of sales of husband's property, and a debt due him, amounted to three thousand two hundred and eighty-seven dollars seventy-five cents.

The claims put down as previleged and secured by judicial mortgages are, first heirs of Ann Jones, deceased, for amount

of principal and interest, six thousand four hundred and nineteen dollars fifteen cents, which exhausts the succession by one thousand seven hundred and seventy-four dollars eighty-six cents.

Next comes a judgment of the heirs of Gayle, for one thousand eight hundred and fifty dollars, after deducting a medical bill, and secured by a judicial mortgage.

The heirs of Gayle made opposition to the tableau, and denied the right of the widow, to take half of the community of acquests and gains, and prayed that her claim be rejected.

They next oppose the claim of the heirs of Mrs. Ann Jones, as privileged. They allege that their claim has the highest privilege, and should be placed first on the tableau, as being supported by a judicial mortgage on all the estate of the deceased: they pray that the tableau be amended, according to the facts set out in their opposition, and that they be placed first, and their claims allowed accordingly.

An agreement was made between the parties, that the contestation of claims, be restricted to that between the heirs of Gayle, and the heirs of Ann Jones, relative to the right of preference.

The heirs of Ann Jones support their claim, by four judgments, obtained against the deceased in his life-time, and recorded on the first of August, 1820. There was another judgment rendered in June, 1821, but was never recorded.

The heirs of Gayle obtained judgment for part of their claim, 30th June, 1823, recorded the 8th July following, for the sum of seven hundred and twenty dollars; the remainder is not shown to be entitled to any privilege.

The probate judge, in rendering judgment, states, "that the heirs of Mrs. Jones, recovered five judgments against the deceased, four of which were recorded on the 1st August, 1820, and will more than exhaust the separate estate of the deceased. It also appears that the heirs of Gayle, on the 30th June, 1823, recovered a judgment against the deceased, for one thousand one hundred and twenty dollars, with interest, which was recorded on the 8th July, 1823. It is contended on the part of Gayle's heirs, that the judgment of the heirs of

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Jones, not having been recorded in ten days from the rendition thereof, under the act of 1813, are null and void, as regards those having recorded their judgment in due time; and that they have a superior mortgage, which entitles them to be paid in preference." The judge overruled the opposition, and sustained the claims of Jones's heirs, according to its rank and privilege as placed on the tableau. The heirs of Gayle appealed.

The clause of the recording act of 1813, on which the appellants rely, is as follows: "*All final judgments* and awards of arbitrators, confirmed by the judgment, &c., of a court of competent jurisdiction, *shall within ten days after such judgment is rendered, be recorded*, in the manner prescribed by law, &c." 2 *Moreau's Digest*, 287.

T. G. Morgan, for Gayle's heirs, and the appellants, contended, that as Jones's heirs had not recorded their judgment, within the ten days required by the act of 1813, they had lost their privilege; that Gayle's heirs, having recorded theirs within the time required, were entitled to the preference.

Bradford, contra.

Bullard, J., delivered the opinion of the court.

The administrator of the estate of W. Williams, put down on the tableau of distribution, the heirs of Jones, the appellees, as mortgage creditors, in virtue of certain judgments recorded against the intestate, in 1819 and 1820, which were not recorded within the ten days after their rendition. The heirs of Gayle, who had also obtained a judgment, which was recorded within the delay of ten days, in 1823, but after the former judgments had been recorded, opposed the homologation of the tableau, on the ground, that the judgments in favor of Jones, were null and void, except between the parties, because not recorded within the delay prescribed by the act of 1813; that they could produce no effect as to them, whose judgment was duly recorded, according to the

statute. The words of the statute are, "all sureties, sales, contracts, judgments, sentences and decrees aforesaid, and all liens of any nature whatever, having the effect of a legal mortgage, which shall not be recorded agreeably to the provisions of this act, shall be utterly null and void, to all intents and purposes, except between the parties thereto."

The neglect or omission to record a judgement within *ten days* after its rendition, under the recording act of March 26th, 1813, does not render it a nullity, so as to prevent its having the effect of a legal mortgage from the date of its registry, when recorded after the lapse of *ten days*.

The case therefore presents directly the question, whether the neglect to record a judgment within ten days after its rendition, struck it with such radical and absolute nullity, as that it could not produce, when registered afterwards, the effect of a judicial mortgage, as against those, who had no interest, and no right at the time of the registry. The judgment of the opposing creditor, was not recorded, until nearly three years after those of the heirs of Jones, nor does it appear, that the debt existed at the time. The judicial mortgage of the heirs of Gayle, dates from the 8th of July, 1823, and the four judgments in favor of the heirs of Jones, were recorded on the 1st August, 1820.

In giving a construction to this statute, it is contended, that we are bound to give full effect to the will of the Legislature, according to its literal import, when expressed in clear and unambiguous terms. But the third section of the act, furnishes us a clue, which would seem to lead to a different conclusion. It is there said, that "the formality of recording, prescribed by this act, being required solely for the *benefit and information* of the public, the want thereof shall in no wise be prejudicial to the interests of minors, persons insane, or any absent heirs of the estate of a person deceased," &c. Publicity is here announced to be the sole object and purpose of the registry. Notice to third persons, is the principal object of all laws, providing for registry. The old Civil Code, in force at that time, establishes the same principle in more distinct terms. "Though it is a rule, that the conventional mortgage is acquired by the sole consent of the parties, and the judicial and legal mortgages, by the judgment or law which grants it, nevertheless in order to protect the good faith of third persons, who may be ignorant of such covenants, and to prevent fraud, the law directs, that the conventional and judicial

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Statutes in *pari materia* should be construed together, in order to ascertain the meaning of the legislator.

Prior laws are not repealed by subsequent ones, unless by positive enactment or clear repugnancy in their respective provisions.

mortgages, shall be recorded or entered in a public folio book, kept for that purpose," &c. *Civil Code, p.* 464. *art.* 52.

We believe it to be an incontrovertible principle, that all statutes in *pari materia*, should be construed together, in order to ascertain the meaning of the legislator; and that prior laws are not repealed by subsequent ones, unless by positive enactment, or clear repugnancy in their respective provisions. The old Civil Code required, that judgments should be recorded. The 14th article, page 454, declares in negative terms, that "conventional or judicial mortgages cannot operate against a third person, except from the day of their being entered, in the office of the register of mortgages."

We cannot fairly infer, from these different provisions taken together, that the legislature intended to prohibit, under pain of absolute nullity, the recording of a judgment, after the delay of ten days. It would produce no effect, as a mortgage in relation to persons, who in the interval between its rendition and its record, had acquired any right, which might be affected by it, but as the sole object of registry is declared by the statute to be, to give notice, and to prevent frauds, if we were to pronounce the nullity of the recording, we should carry the statute beyond the declared intention of the legislature. We should make it operate, not for the protection of third persons, having an interest at the time, but as conferring an advantage, on those who were at the time without any interest or right whatever, and who had notice of the existence of the previous judgments.

This court recognised the same principle, substantially, in the case of Morrison et als. *vs.* Trudeau. 1 *Martin, N. S.* 384, in relation to the vendor's previlege. The question in the case of Jenkins *vs.* Nelson's syndics, was between the plaintiff and creditors of an insolvent, in relation to a contract for building, not recorded according to the statute. The point now under consideration, did not present itself; and in the previous case of Lafon *vs.* Sadler, the only question was, whether a written contract was essential to create the builder's privilege. 11 *Martin*, 437. 4 *Martin*, 476.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

MENARD *vs.* COX.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the cashier of a bank refuses to pay a check, on the ground that the drawer had no funds in bank, but at the same time advances the money to the *bearer*, it will be presumed the cashier paid his own money as a loan, which will authorise him to recover, in a personal action, in his own name, against the borrower.

When the record furnishes no point, on which the appellant could reasonably hope to obtain a reversal of the judgment on appeal, it will be affirmed with *ten per cent.* damages, and costs.

The plaintiff sues, for the recovery of three hundred dollars from the defendant, on the following draft:

"Cashier of the branch bank of the Bank of Louisiana, pay Sebastian Hiriart or order, three hundred dollars."

"$300." [Signed] "E. W. Potts."

Endorsed. "I have received the within amount,"

[Signed] "Wm. P. Cox."

The draft is without date; and the plaintiff alleges, that the defendant presented it to him as the cashier of the bank, about the 20th January, 1830, and represented, that Potts the drawer, was much pressed for money, and bound himself personally, to refund the amount of said draft; that he refused payment at first, but that the defendant, in addition to the promise of the drawer, acknowledged on the back of the draft, that he had received the money, before he would pay

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the same; he charges, that it was upon the personal responsibility of the defendant, that he advanced the money, &c.; he alleges a demand on the defendant, and refusal to pay, and prays judgment for the amount thereof, and interest.

The defendant pleaded a general denial.

Louis Menard, witness for plaintiff, states, that E. W. Potts obtained a loan of one thousand five hundred dollars, from the branch bank of Louisiana, in 1830, which the plaintiff as cashier, paid over to the present defendant W. P. Cox, as the agent of Potts; that it was paid as follows: in a check for two hundred and sixty-four dollars, and in one of seven hundred dollars, and in another of one hundred and sixteen dollars, and the balance of three hundred dollars, (after deducting one hundred and twenty dollars, the amount of the discount) was paid, without any check, to said Cox; that the draft sued on, was presented about three weeks after the above sums were paid over, and that the plaintiff told defendant at the time, that E. W. Potts had no money in bank; witness says, the consideration and inducement for paying the draft, were the representations of defendant, that Potts was in great want of money, and that the former agreed to refund it, as soon as he should examine a memorandum, handed to him by the plaintiff, of the payments of the amount of Potts's loan, which he said was in his pocket-book, at home.

The cause was submitted to a jury, who found a verdict for the plaintiff, for the amount of his claim, with legal interest; from the judgment rendered thereon, the defendant appealed.

Brunot, for the plaintiff.

Morgan, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff alleges that one Potts, obtained a loan from the bank, of which the former was cashier, for one thousand five hundred dollars, which was paid over to the defendant

Cox, as agent of the borrower, after deducting the discount for one year. That after the defendant had received the whole amount, he presented to him a draft or check, signed by Potts, for three hundred dollars, which the plaintiff refused to pay, as the drawer had no funds. That the said Cox represented to him, that Potts was much in want of that sum, and if he, the plaintiff, would advance it, that he would be personally bound to refund the amount; whereupon the plaintiff alleges he did advance that sum to Cox, on his personal responsibility and promise to refund.

The defendant pleaded the general denial, and the issue between the parties, was tried by a jury, whose verdict was in favor of the plaintiff, and the defendant appealed.

The allegations in the plaintiff's petition, are fully proved by evidence received without exception, in the District Court, The record furnishes no point, on which the defendant could reasonably hope to obtain a reversal of the judgment in this court. It is, however, contended by the counsel for the appellant, that the sum claimed, was paid out of the funds of the bank, of which the plaintiff was cashier, and that it was in fact an overdraft, which the cashier cannot recover, without first showing that he has been rendered responsible to the bank. But there is no evidence that the money was paid out of the funds of the bank; on the contrary, it is shown that the plaintiff refused to pay the draft or check, and advanced the money to the defendant as a loan. We must presume that he advanced his own money, and that the transaction was wholly personal between the parties.

Where the cashier of a bank refuses to pay a check, on the ground that the drawer had no funds in bank, but at the same time advances the money to the *bearer*, it will be presumed the cashier paid his own money as a loan, which will authorise him to recover in a personal action in his own name against the borrower.

When the record furnishes no point on which the appellant could reasonably hope to obtain a reversal of the judgment on appeal, it will be affirmed with *ten per cent* damages and costs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with ten per cent. damages and costs.

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LOUIS, f. m. c.
vs.
CABARRUS ET ALS APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Proof of the residence of a slave, in a free state, the constitution of which forbids slavery, during the space of two or three years, unconnected with any other proof, is insufficient in law, to entitle such slave to his freedom.

The residence of a slave, in a state where slavery is forbidden, contrary to the will, or without the consent of the owner, does not deprive the latter of his right to his property.

The consent of the owner of a slave, that he should go and perform work and labor in a free state, does not of itself free the slave, though this may be effected, by the slave's going there under this permission.

The plaintiff claims to be a free man, and institutes this suit against the defendants, who hold him in slavery, to obtain his freedom; he alleges, that he resided in the state of Ohio, two or three years, where slavery is prohibited, and is consequently free: He prays judgment, that he may be entitled to his freedom, and for thirty dollars per month, from the commencement of suit until he shall be set free.

The defendants expressly deny every allegation in the petition, and aver that the plaintiff was born a slave, of a slave mother, and that they purchased him as a slave for life, and paid a valuable consideration for him.

Mrs. Leverett, a witness for plaintiff, swears, that she first saw Louis Richardson, the plaintiff, about twelve or thirteen years ago, in Cincinnati, in the state of Ohio; that she knew him to reside there two or three years.

Mr. Blake, witness for defendants, states, that in 1833 plaintiff told him he was born a slave; but said he was entitled to his freedom; that he had worked in Cincinnati, with his master; that he became free by residing in the state of Ohio, and at the same time, stated he was taken back to Kentucky, where his master resided, and continued to serve him as a slave, until he was brought to Louisiana, and sold to defendants.

The cause was submitted to a jury, on this testimony.

The counsel of the defendant, moved the court to charge the jury, that proof of a residence of two or three years, in the state of Ohio, unconnected with other proof, is not sufficient in law, to establish his freedom, &c., which the court refused, but instructed the jury, that if the plaintiff worked in Ohio, by consent of his former owner, that he did thereby become free, &c.

The jury returned a verdict, "that the plaintiff was a free man." Judgment was rendered in conformity to the verdict, from which the defendants appealed.

Saunders, for the plaintiff.

Turner, contra.

Martin, J., delivered the opinion of the court.

The defendants are appellants from a judgment, which declares the plaintiff entitled to his freedom. It is in proof that he was born a slave, but he claims his freedom by emancipation, resulting from a residence of two or three years in the state of Ohio, the constitution of which, declares that there shall be no slavery or involuntary servitude within that state. The plaintiff obtained the verdict of a jury. There does not appear to be any thing in the record to induce the belief that the jury erred. This court is of opinion the verdict is correct.

But the counsel for the defendants has drawn the attention of the court to a bill of exceptions taken to the refusal of the judge to charge the jury, that proof of the residence of the plaintiff in the state of Ohio, during the space of two or three years, unconnected with any other proof, was insufficient in law, to establish his freedom. And, further, that a person held as a slave, in a slave-holding state, does not become free by residing a short time in a free state, unless his owner resides there as a citizen of that state, and carries along with him such slave; that in this case, unless the jury believed that the former owners actually resided in Ohio as a citizen, having taken the plaintiff with him as his slave, they ought not to find a verdict in favor of the latter, declaring him free.

Proof of the residence of a slave in a free state, the constitution of which forbids slavery, during the space of two or three years, unconnected with any other proof, is insufficient in law to entitle such slave to his freedom.

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The residence of a slave, in a state where slavery is forbidden, contrary to the will or without the consent of his owner, does not deprive the latter of his right to his property.

The consent of the owner of a slave that he should go and perform work and labor in a free state, does not of itself free the slave, though this may be effected by the slave's going there under this permission.

The court charged the jury, that if the plaintiff resided in the state of Ohio, by the consent of his master, he did thereby become a *freeman;* that the consent of the owner, that the slave should go into the state of Ohio and perform labor, was sufficient to entitle him to his freedom.

It appears to this court, that the judge *a quo*, ought to have charged the jury in the manner required in the first part or branch of the request of the defendant's counsel. The residence of a slave in the state of Ohio, contrary to the will, or without the knowledge of his master or owner, does not deprive the latter of the right to his property.

The latter part of the judge's charge to the jury, is too loosely expressed, and indefinitely stated, to justify a finding thereon.

The consent of the master, that the slave should go and perform work and labor in Ohio, does not, of itself, free the slave, though this may be effected by the slave's going there under this permission.

All parties have a right to a trial by jury, aided by any *legal* opinion of the court which they may request, and uninfluenced by any improper charge of the judge.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; the verdict set aside, and the cause remanded with directions to the judge *a quo*, to charge the jury that proof of a slave's having resided in the state of Ohio, or any free state during the period of two or three years, unconnected with any other proof, does not authorise or entitle him to his freedom; and to abstain from charging or stating to the jury, that the permission given by the master to his slave, to go and labor in the state of Ohio, had the effect to emancipate him. The costs of the appellate court to be paid by the plaintiff and appellee.

HEIRS OF KIMBALL *vs.* HEIRS OF LOPEZ.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

When the record does not furnish a certificate, either by the judge or clerk, that it contains all the evidence on which the cause was tried, nor a statement of facts, the cause cannot be examined on its merits, but the court will decide on the questions of law, presented by the bills of exception in the record.

A sheriff cannot be called as witness, to prove what proceedings took place, at a certain sale made by him, when the return made on the execution is silent, or stated that the execution had been stayed, by order of the District Court.

Parole evidence is inadmissible, to supply defects in the sheriff's return of proceedings under an execution, or where it contradicts the official return of the officer.

The plaintiffs sue as the heirs and legal representatives of Esther McD. Kimball, to recover a slave named Peter, worth eight hundred dollars, who they allege, is illegally in the possession of the defendant's ancestor. This suit was filed the 13th May, 1826, and on the 20th, in pursuance of the prayer of the petition, the negro was sequestered. The plaintiffs set up title to the slave in contest.

The defendant pleaded a general denial, and excepted to answering the petition, because a copy in the French language was not served on him; on the merits, he says he purchased the slave in question, of one John Sands, in 1815, by an act under private signature, which is annexed; and that Sands purchased him at sheriff's sale, the 11th of July, 1814, as appears by the deputy sheriff's bill of sale, of that date: He pleads the prescription of ten years, and calls John Sands, his vendor, in warranty, and in the event of eviction, he prays judgment against his warrantor, for the value of the slave, and costs.

Sands answered to the call in warranty. He states he purchased the slave Peter, at sheriff's sale, for the parish of

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East Baton Rouge, when a boy of about thirteen years of age; that Lopez proposed to take him, for the price at which he was bid off, and be substituted to him as the purchaser, to which he consented, and the defendant took possession, and has continued to possess said slave ever since; that shortly after the inception of this suit, he was induced, at the instance of Mr. Lopez, to sign an act of sale of Peter to him, and that the latter stated at the time, he had no intention or wish to render him liable, in consequence of signing it, but wanted it, and had it dated back to the 25th February, 1825, to enable him to resist this suit; that since this transaction Lopez has died, but his heirs and representatives are well acquainted with the facts, and this effort by them to call him in warranty, is illegal and fraudulent; that the plaintiffs have no right to recover, as the slave was legally sold, and purchased in good faith, by this respondent, in the manner he has alleged.

The testimony shows, that Esther McD. Kimball was the wife of Wm. Williams, that in 1809 she and her brother Benjamin Kimball, signed an obligation to pay one David B. Stewart, four hundred and thirty-six dollars; that after the death of Williams, his wife married John Cammack. In 1814, judgment was obtained on the above obligation, against the estate of B. Kimball and Esther McD. Cammack, after her second marriage. The negro Peter, then a boy, was given up to Cammack and wife, sold under execution to satisfy the judgment of Stewart, and purchased by John Sands, the warrantor.

Kelly, a witness for plaintiff, states that he knows the negro Peter, and that he was born the property of William Williams, the first husband of Esther McD. Kimball, the mother of plaintiffs. His mother's name was Sucky, and was derived from the estate of Frederick Kimball, as part of William Williams's wife's estate, which she inherited from her father.

Dorothy Wells knew the slave Peter, from his birth until 1812. He was the property of Mrs. Williams, the mother of plaintiffs. She received his mother from her father's estate.

The defendant offered in evidence, the sheriff's deed of the sale of Peter, to John Sands, which was objected to by the plaintiffs' counsel, on the ground, that it did not appear to be returned and recorded in the clerk's office, and because the judgment and execution, in virtue of which the sale was made, had not been previously shown by him; the court admitted the document in evidence as sufficient, upon which to found the plea of prescription. The plaintiffs' counsel took his bill of exceptions to the opinion of the court.

The defendant, after the other evidence had been produced, and the testimony gone through on both sides, offered the record of the judgment and execution of Stewart *vs.* Kimball et als., under which the slave in contest was sold, which was objected and excepted to by the plaintiffs' counsel, as coming too late, but was admitted.

The district judge considered the plaintiffs failed to make out their case, and gave judgment for the defendants, from which, after an unsuccessful motion for a new trial, the plaintiffs appealed.

Turner, for the plaintiffs.

R. & A. N. Ogden, for the defendants.

Bullard, J., delivered the opinion of the court.

When the record does not furnish a certificate either by the judge or clerk, that it contains all the evidence on which the cause was tried, nor a statement of facts, the case cannot be examined on its merits; but the court will decide on the questions of law presented by the bills of exception in the record.

A sheriff cannot be called as

The plaintiffs sue to recover a slave, which they claim as the property of their ancestors, in the possession of the defendants. The defendants plead title derived from one Sands, who was cited in warranty, and whose title exhibited is a sheriff's deed, and the defendants further rely on prescription.

The transcript of the record does not furnish us a certificate either by the judge or the clerk, that it contains all the evidence on which the cause was tried in the court below, nor a statement of facts. We cannot, therefore, examine the case on its merits, but confine our attention to the questions of law, presented on the bill of exceptions in the record.

In the progress of the trial, it appears that T. C. Stannard, was examined as a witness to prove, what proceedings took

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witness to prove what proceedings took place at a certain sale made by him, when the return made on the execution is silent, or stated that the execution had been stayed by order of the District Court.

Parole evidence is inadmissible to supply defects in the sheriff's return of proceedings under an execution, or where it contradicts the official return of the officer.

place in execution of a *fieri facias*, by virtue of which the slave in question was sold. He had acted as deputy sheriff, and the return on the execution was silent as to the sale, and indeed, stated that the execution had been stayed by order of the District Court. His testimony was objected to, and a bill of exceptions taken to its admission by the court. The court was clearly in error. The testimony went directly to contradict the official returns of the officer, and to supply a defect in the proceedings which can only be done by record evidence. Parole evidence is, in our opinion inadmissible to supply so important a link in the chain of titles, as the adjudication of the property by the sheriff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, that the case be remanded for a new trial, with directions to the district judge, not to admit parole evidence to contradict the return of the sheriff, nor to prove the adjudication of the property, and that the defendants pay the costs of the appeal.

POND *vs.* HORTON.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the record is not filed in the Supreme Court, on the return day thereof, and no application is made to the court for leave to file it after that day, the appeal will be dismissed on motion.

In this case, the appeal was granted on the 27th November, 1833, returnable to the Supreme Court, at Baton Rouge, the first Monday in August, 1834. The first Monday was the third day of the month, and the appeal

record was not filed, until the ninth day of the month. The appeal was taken by the defendant and appellant.

Andrews, for the plaintiff and appellee, moved to dismiss the appeal on the following grounds:

1. That the record was not filed on the return day thereof.

2. The transcript of the record, was filed with the clerk after the return day, without leave of the court, or showing cause why it was not sent up in time.

3. It appears from the sheriff's return, that a copy of a copy of the petition of appeal, was served on the appellee.

4. And should this motion be overruled, the appellee denies that there is error to the injury of the appellant; and further says, that the appeal is frivolous, and taken for delay; wherefore he prays the affirmance of the judgment below, with ten per cent. damages, and costs.

Saunders, contra.

Mathews, J., delivered the opinion of the court.

In this case the appellee moves to dismiss the appeal, on the grounds, that the transcript of the record of proceedings was not filed in the Supreme Court, on the day of the return of the appeal, as required by the 587th article of the Code of Practice and that no application was made to the court, for leave to file it after that day, as prescribed by law.

Where the record is not filed in the Supreme Court, on the return day thereof, and no application is made to the court for leave to file it after that day, the appeal will be dismissed on motion.

These we believe to be good grounds, in support of the motion to dismiss.

It is, therefore, ordered, that the appeal in this case be dismissed.

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LOPEZ ET ALS. *vs.* BERGEL.

LOPEZ ET ALS.
vs.
BERGEL.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

When the defendant suffers judgment by default, to be taken against him, it is a presumption, that by his silence, he acknowledges the justice of the plaintiffs' demand.

Where the defendant does not deny the plaintiffs' debt, but lets judgment go by default, this fact will be considered as a corroborating circumstance, which taken with the testimony of one witness, is sufficient proof of the demand, to make such judgment final.

The omission of the defendant, to deny the plaintiffs' capacity to sue, waives the right to do so, and dispenses him from the necessity of proving it, even when the demand is denied. The same consequence should follow, when there is a legal presumption of its justice being confessed.

The defendant's acknowledgment, and promise to pay his note, before and after the lapse of *five* years from the time it became due, and before suit is brought, will take the case out of prescription, when the action would otherwise be barred.

This is an action on a promissory note, executed by Gregorio Bergel, to the ancestor of the plaintiffs, the 22d August, 1825, for five hundred and thirteen dollars, payable one year after date, with interest, at the rate of ten per cent. per annum, from the time it became due, until paid. The suit was filed December 21st, 1833, and citation served the third day thereafter.

The plaintiffs sue, as the widow and heirs of the obligee of the note, and pray judgment for the amount thereof, with interest.

Judgment by default was rendered against the defendant, on the 7th January, 1834, and made final, after producing satisfactory proof of the demand, on the 17th of the same month, and signed on the 19th February following, without any appearance of the defendant.

The plaintiffs called a single witness to *prove their demand*, who testified, that he presented the note repeatedly to the defendant for payment, who always promised to pay it; that the first time he presented it, was in 1828, and at other times, every year thereafter.

On the 13th June, 1834, the defendant obtained an order of appeal, to this term of the court (August, 1834).

Lawrence & Winthrop for the defendant and appellant, urged the following points, in support of the case on the appeal:

1. There is no proof, that the plaintiffs possess the character in which they sue. They sue as the heirs and legal representatives of Lopez, which they specially set out and allege, and it is not seen why they should not be held to as strict proof of it, as if the defendant had denied it specially.

2. The Code of Practice requires, that to be entitled to a judgment by default, the plaintiff must prove his demand, which is required in *all cases*. *Code of Practice*, 312.

3. The execution of the note is not legally proved, according to the phraseology of the article of the Code of Practice referred to. When the law prescribes a particular mode of judicially investigating a fact, the judge is not at liberty to adopt a different course, and if he does, the fact will not be considered as proved. *Code of Practice*, 325.

4. The acknowledgment of the note, and promise to pay it, are not sufficiently proved. They should have been, either in writing, or have been evidenced by the testimony of one witness at least, with corroborating circumstances.

5. A contract for the payment of a sum exceeding five hundred dollars, must be proved by the testimony of *one credible witness, and other corroborating circumstances*. *Pothier* admits, that a verbal promise to pay, when the debt exceeds one hundred livres, is inadmissible, according to the ordinance of 1667, which requires such a promise to be in writing. *Pothier on Obligations, No.* 659. *La. Code*, 2257. 8 *Martin, N. S.* 457. 3 *La. Reports*, 213. 5 *Ibid.* 266. 6 *Ibid.* 525.

6. The claim was barred by the prescription of *five* years, *which is now pleaded.*

7. The acknowledgment, and promise to pay, not being proved, as shown in the preceding points, there is no evidence to repel the plea of prescription.

R. & A. N. Ogden, for the appellees.

1. The plea of prescription cannot prevail. It was not pleaded regularly and at the proper time, and the court cannot now consider it. *La. Code*, 3486, 3516.

2. The plaintiffs were not bound, to prove the capacity in which they sued, as it was not denied. The rule is well established, that where a party sues in a representative capacity, *he is not* required to prove that he possesses that capacity, unless it is *specially denied.*

3. The law declares, that a judgment by default, is a tacit joinder of issue and a tacit confession by the defendant, of the justice of the plaintiff's demand; the reason is therefore much stronger, *in not* requiring proof of the representative capacity of the plaintiff, in this case, than when there is a general denial. *Code of Practice*, 360.

4. The objection, that the execution of the note was not proved, in pursuance of the article 325, of the Code of Practice, has no force. That article relates to a case, when the defendant has denied his signature.

5. There is no law, requiring the acknowledgment of the maker of the note to pay it, to be made in writing, or proved by the testimony of two witnesses, or of one with corroborating circumstances.

6. In this case the acknowledgment by the defendant, that he executed, and would pay the note, was made before the prescription was complete, and is different from that made after the debt had been extinguished by prescription, in which case it would only be evidence of a new contract.

Martin, J., delivered the opinion of the court.

The defendant who is sued on a promissory note, suffered judgment by default to be taken, and on its being made final he appealed.

He now claims the reversal of the judgment, on the ground that the debt was proved by one witness only, without any corroborating circumstances; that the plaintiffs, who sue as the representatives of the original obligee and payee of the note, have not proved their representative capacity; and finally, he relies on the plea of prescription filed in this court.

The pretensions of the defendant are resisted on the ground, that he had not denied the debt, and that this fact was a corroborating circumstance of sufficient weight, to authorise the judgment by default to be made final on the testimony of a single witness. That the capacity of the plaintiffs had no need to be proven, as it was not sufficiently denied; and that, although the suit was brought more than five years after the note became due, prescription cannot be opposed as a bar to a recovery, because there is evidence of repeated acknowledgments and promises to pay. These promises to pay, it is urged, are sufficiently proved by the testimony of one witness, because the possession of the note by the plaintiffs is a corroborating circumstance, as it raises a strong presumption of its being unpaid.

The Code of Practice, article 360, provides, that when the defendant suffers judgment by default to be taken against him, it is a presumption of his having, by his silence, acknowledged the justice of the plaintiffs demand. It is true, that in the same article, the legislator interprets this silence as evidence of the defendant having *joined issue* with the plaintiff, i. e. denied his allegations. This discrepancy does not, however, prevent the declaration, that by suffering judgment to be taken by default, from raising the presumption of an acknowledgment of the demand. This declaration, the legislature had the power to make. They have made it. It is not the duty or business of this court, to deprive it of its effect, and to avoid considering what the legislature has pronounced to be a presumption of the acknowledgment of the justice of a demand, as a legal corroborating circumstance, which strengthens the proof of it by one witness; especially when we reflect, that under the former Code, the mere suffering

When the defendant suffers judgment by default to be taken against him, it is a presumption, that by his silence he acknowledges the justice of the plaintiffs' demand.

Where the defendant does not deny the plaintiffs' debt, but lets judgment go by default, this fact will be considered as a corroborating circumstance, which taken with the testimony of one witness is sufficient proof of the demand to make such judgment final.

The omission of the defendant to deny the plaintiffs' capacity to sue, waives the right to do so, and dispenses him from the necessity of proving it, even when the demand is denied. The same consequence should follow when there is a legal

judgment to be taken by default, was, in a case like the present, complete proof of the debt.

If the omission of the defendant to deny the plaintiff's capacity to sue, waives the right to do so, and dispenses him from the necessity of proving it when the debt is denied; the same consequence ought to follow, when there is a legal presumption of its justice being confessed.

The possession of the note by the plaintiffs, afford some presumption that it is still unpaid. The forbearance to sue, may well be imputed to the repeated promises of the defendant, and is a corroborating circumstance of the evidence on record, that the promises were made. The cause may well be presumed from the effect.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

presumption of its justice being confessed.

The defendant's acknowledgment and promise to pay his note before and after the lapse of *five* years from the time it became due, and before suit is brought, will take the case out of prescription, when the action would otherwise be barred.

SPOTTS *vs.* LANGE AND LONGUEPE.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE SECOND PRESIDING.

Where two purchasers join in the purchase of a boat, its load and cargo, and one acts as the agent of the other; when sued jointly for the price, the one who authorised the other to act as his agent, cannot call his co-defendant in warranty.

Purchasers of property, from a person having the *apparent* right of disposing of it, are not to be considered as trespassers.

An amendment, correcting an error in the petition, by describing certain timbers in a house-frame, to be *poplar* instead of *walnut*, as originally stated, does not require an answer.

The plaintiff alleges, that in the month of October, 1832, he entrusted one Samuel Barber, in Henderson county, in the state of Kentucky, with the captaincy and agency of a flat-

boat and her load, consisting of plank, scantling and house-frames, to bring to New-Orleans; that in December, when the boat and load arrived at Baton Rouge, Hilaire Longuepe and Charles Lange, fraudulently and without any right or title, took possession of her, and converted to their own use, the said boat and her loading, worth the sum of one thousand four hundred dollars, for which he prays judgment, or the restoration of the boat and cargo, and for six hundred dollars in damages and costs.

The defendants separated in their answers. Lange pleaded the general issue; specially denying all fraud, or that he is bound either personally or *in solido*, with said Longuepe, for the restitution of said boat, lumber, and house-frame, or the payment of any sum of money therefor. He further states, he purchased from Hilaire Longuepe, one-half of said boat and lumber, and part of a house-frame, different from that described in the petition, for which he paid six hundred dollars; that Longuepe showed him a receipt, by which it appeared, he had paid eight hundred dollars for the boat and its cargo, from which he appeared to be the rightful owner. He prays judgment in warranty, against Longuepe, for the same amount that may be obtained against him, in case it is made to appear, that the said boat and its contents, were the property of the plaintiff, &c.; and for three hundred dollars in damages.

The plaintiff had leave to amend his petition, by alleging, that the *house-sills* stated therein to be of walnut, were in fact made of *poplar*.

Longuepe pleaded a general denial; and that he purchased the boat and lumber, as the agent of Charles Lange, his co-defendant, from a person, purporting to be the commander of the boat, whom he believed to be the *bona fide* owner; but that he never took possession of any part of the property, which was taken by his co-defendant. He prays for a separate trial.

Certain interrogatories were propounded by the plaintiff, in a supplemental petition, to be answered by the defendants in open court, at a time to be fixed. Longuepe, one of the defendants, moved to have them struck out, on the ground,

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that he had severed from his co-defendant in his trial; that his defence is adverse to that of his co-defendant, &c. The motion was overruled, and a bill of exceptions taken.

Lange answered the interrogatories, and declared that he bought the half of the flat-boat and lumber, &c., from Longuepe, his co-defendant, who showed a receipt, by which it appeared he gave eight hundred dollars, for the boat and her loading. After taking out part of the contents of the boat, he gave Longuepe six hundred dollars for the balance. He denied that Longuepe acted as his agent.

Longuepe, in answer to the interrogatories, stated that he purchased the boat and contents, as the agent of Lange, for two hundred dollars. That the person from whom he bought, after stating his reasons, and on giving a bill of sale, stated in it, that the price was eight hundred dollars, &c.

Mr. Jones, a witness for plaintiff, states that he assisted in procuring the lumber and house-frame in question, and that he has since seen the same house-frame, and about fourteen or fifteen thousand feet of the boards and scantling, in the lumber-yard of Lange; as a carpenter, the witness estimates the house-frame, and what plank, scantling and materials he has seen in possession of the defendant, as worth seven or eight hundred dollars, not including the fourteen or fifteen thousand feet of lumber, &c., which is worth about three hundred dollars.

The cause, on this evidence, with that of several witnesses, substantially corroborating it, was submitted to a jury, who returned a verdict of one thousand one hundred dollars for the plaintiff, against Lange, and in favor of Longuepe, upon which judgment was rendered. The defendant's counsel moved for a new trial, on several grounds, which was overruled, and Lange appealed.

R. & A. N. Ogden, for the plaintiff.

1. The verdict, and judgment thereon, is fully supported by the law, and the evidence of the case. Whether Lange knew at the time or not, that he was purchasing the property

of another, he was bound to return it, or its value, to the real owner, when he appeared and claimed it. *Story on Bailment, page* 70 *and* 79. 2 *Kent's Com.* 262. *Bacon's Abridgment tit. Merchandise.* 4 *Martin, N. S.* 288. 3 *La. Reports*, 282.

2. The evidence showing that Lange had taken all the property, and converted it to his own use, he is certainly liable for the value of it; the plaintiff having in his petition, demanded a judgment against each defendant, for the whole amount.

Turner, for the appellant. The defendant Lange seeks a reversal of the judgment against him, on the following grounds:

He assigns as error, apparent on the face of the record, that there was not a *contestatio litis*, to the amended petition. 4 *La. Reports*, 13.

2. The verdict does not respond to the plaintiff's demand, or to the issue between the parties, that being in the alternative for the property or its price; the verdict is therefore, contradictory, inconsistent and illegal.

3. If at all liable, Lange was only jointly bound with his co-defendant. He had sold the house-frame, and is only bound for the price he received for it.

4. But Lange was the true owner of the property; he had purchased it fairly, and for a valuable consideration, without notice of the plaintiff's title, and in due course of trade. 8 *Martin. N. S.* 368.

5. He committed no fraud or trespass, was not liable for damages, and is at all events, entitled to be re-imbursed for the money he paid for the property: He therefore insists on a reversal of the judgment, and one rendered in his favor, or that the cause be remanded.

Martin, J., delivered the opinion of the court.

This action is brought to recover from the defendants, *in solido*, a flat-boat and its loading, or a sum of one thousand four hundred dollars as its alleged value.

The defendant pleaded the general issue, and averred he had purchased from his co-defendant, one undivided half of a flat-boat, with a quantity of lumber and timber, and particularly part of a house frame, and that the latter had appropriated to his own use, such part of the timber and lumber as he wanted, and for the remainder, which came into his (Lange's) possession, he paid six hundred dollars to his co-defendant, whom he called in warranty.

Longuepe (the other defendant) pleaded the general issue, and specially denied having taken possession of the boat or its loading. He admitted, that as agent of his co-defendant, he had purchased a quantity of lumber and timber on board of a flat-boat, from a person who called himself (and whom he believed to be) the real owner. He averred that his co-defendant took possession of the lumber and timber.

The plaintiff, with leave, amended his petition, by stating that the sill of the house-frame, was of poplar, and not of walnut, as had been erroneously stated. To this amendment, neither of the defendants filed an answer.

The plaintiff next filed a supplemental petition, praying that the defendants might answer several interrogatories annexed thereto.

Longuepe objected that a motion he had made for a separate trial was still pending, and Lange's answer must be taken in his own favor, on the demand in warranty. That the interrogatories did not correspond to the allegations in the petition, and they were not filed until after the defendants had answered the petition. Ten days at least should have been allowed them to answer in.

The defendants were ruled to answer the interrogatories, on the following day, and the defendant Longuepe excepted.

Lange, in answering, averred the truth of his statements in his answer to the petition, denied that his co-defendant was his agent in the purchase, and averred that he did not know any thing but the payment of six hundred dollars.

Longuepe answered he was his co-defendant's agent in the purchase, and was especially authorised by him for that purpose. That two hundred dollars only, were paid to the

ostensible owner, for the boat and loading, which sum was paid by him, in the presence of the boat's crew. That his co-defendant desired the price to be stated at five hundred dollars, but the vendor put it down at eight hundred dollars.

The bill of sale was in the following words: "Baton Rouge, Dec. 4, 1832. This will certify that I have sold a flat-boat loaded with lumber to Hilaire Longuepe, for the sum of $800, with all the articles thereto belonging."

The subscribing witness testified, that Lange was not present at the signing of the bill of sale.

The vendor testified, that, as the agent of the plaintiff, he had delivered the lumber and timber claimed in the petition to Barber, in Kentucky. He identified a large portion of it, which he, being a carpenter, estimated at one thousand one hundred dollars.

Monget testified he heard Lange tell his co-defendant to purchase the boat and loading for them, and to pay the two hundred dollars.

Roulston, a hand on board, deposed that the boat was first, commanded by Barber, but afterwards by Jones the vendor.

There was a verdict against Lange for one thousand one hundred dollars, and for his co-defendant.

Judgment was given accordingly, and Lange appealed, after an unsuccessful effort to obtain a new trial.

Our attention has been given to a bill of exceptions taken to the charge of the judge to the jury, in which he instructed them to disregard the appellant's claim on the warranty, expressing his opinion that co-trespassers were not entitled to an action of warranty, which is confined to real property; adding, that no order to cite in warranty had been given or prayed for in the petition, or judgment by default had been taken.

Where two purchasers join in the purchase of a boat, its load and cargo, and one acts as the agent of the other; when sued jointly for the price, the one who authorised the other to act as his agent, cannot call his co-defendant in warranty.

It does not appear to us the judge erred, although we are not able to see the applicability to the present case, of that part which relates to co-trespassers, as the purchase having been made from a person having the apparent right of disposing of the property (purchased) the vendees ought not to be considered as trespassers.

Purchasers of property, from a person having the *apparent* right of disposing of it, are not to be considered as trespassers.

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An amendment correcting an error in the petition, by describing certain timbers in a house-frame, to be *poplar* instead of *walnut*, as originally stated, does not require an answer.

The amendment stating the sills of the house frame, to be not of walnut, but of poplar timber, appears to us a mere correction of an error in the petition, which did not render an answer necessary.

On the merits, nothing appears to authorise our interference with the verdict. It does not appear to us proper to notice the exceptions of Languepe, on his being ruled to answer interrogatories as he did not appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

REYNOLDS, BYRNE & CO. *vs.* YARBOROUGH.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

Where parties enter into an obligation, containing a penalty of seven thousand dollars, for the faithful payment of a sum not exceeding five thousand dollars, at a particular time, on failure of the principal to comply, the surety will only be bound for the principal sum stipulated to be paid, and not the penalty.

The penal clause in the obligation, is the compensation for the damages the creditor sustains, by the *non-execution* of the principal obligation.

But damages due for the *delay* in the performance of an obligation to pay money, are called interest.

Conventional interest, whether stipulated in *eo nomine*, or in the shape of a penalty, cannot exceed *ten per cent.*

In an action to recover damages, for the non-performance of a contract, proof of putting the party *in morâ*, by a special demand, must be made.

In an action to recover the principal sum, and to enforce the performance of the primary obligation in a contract, the commencement of suit, puts the defendant in default, in relation to damages.

The plaintiffs institute suit on an obligation, signed by one John Bostwick, as principal, and Stephen Yarborough, as surety, in which they acknowledge themselves indebted to the plaintiffs, in the sum of seven thousand dollars, conditioned for the faithful payment of five thousand dollars, or such sum, not exceeding that amount, as the defendant Bostwick may be indebted to the plaintiffs, at the end of twelve months, in consequence of endorsements or advances made, and credits given to him, in the course of business.

The plaintiffs allege, that at the end of twelve months, there was a balance due to them from Bostwick, of five thousand six hundred and eighty-six dollars eighty-five cents, according to an annexed account; that this sum has been amicably demanded of Bostwick, and of Yarborough, who have neglected and refused to pay it, by reason of which they are liable on their said bond, and bound to pay the sum of seven thousand dollars, for which they pray judgment *in solido* against the principal and surety; or for the sum of five thousand six hundred and eighty-six dollars and eigty-five cents, the amount due on said account.

The defendants pleaded a general denial; and the defendant Yarborough denied that he had been notified, of the failure of Bostwick to perform the conditions of the obligation sued on, or that he had any knowledge of such failure or refusal, until after commencement of suit.

The district judge, considering the account as proved on the trial, rendered judgment on the minutes, for nearly the sum claimed in the account, amounting to five thousand six hundred and twenty dollars sixty-three cents, with interest, against both defendants.

The counsel for the defendants moved for a new trial, on the following grounds:

1. Because the case was illegally and improperly set for trial.

2. The court erred in rejecting the application for a trial by jury.

3. The judgment is contrary to law and evidence.

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The court ordered the motion for a new trial to be overruled; and the judgment to be so amended, as to stand against Yarborough for five thousand dollars, with interest and costs. From this judgment, so far as it relates to Yarborough, the plaintiffs appealed.

In his answer to the appeal, Yarborough alleges error, on the ground that he was not put in default, and consequently, no legal judgment could be rendered against him, and for which he prays a reversal.

Turner, for the plaintiffs, contended that the defendant could not have the judgment reversed, because he did not appeal from it; and also on the ground of having lost the opportunity of doing so, by not filing his answer to the appeal, in the time prescribed by law.

3. The appellee is required to file his answer, on the return day of the appeal, or within three days thereafter, which he failed to do. *Code of Practice*, 591, 896.

3. The judgment must be reversed, because the obligation of the defendant, binds him for the full amount of the penalty of seven thousand dollars, and for any amount under that sum, which the plaintiffs in pursuance of their agreement, had advanced, disbursed, or became in any way liable for, to Bostwick. This sum is proved to be five thousand six hundred and ninety-five dollars seventy-four cents, exclusive of one hundred and forty-four dollars and fifty cents, commissions, &c.

4. The District Court had no right to change the judgment against the plaintiffs, and in favor of the defendants, after it had once been rendered. *Code of Practice*, 517, 518.

5. The defendant is not entitled to notice on this principle. A person not a party to a bill, cannot complain of the want of notice, unless he can show that it has done him a prejudice, *Bailey on Bills*, 185, *note* 114. *Chitty on Bills*, 204.

Saunders, for the defendant.

Bullard, J., delivered the opinion of the court.

The plaintiffs sue on a bond signed by John Bostwick as principal, and the present appellee, Yarborough as security, by which they engage to pay the plaintiffs seven thousand dollars. In the condition of the bond, it is recited that, "whereas the said Reynolds, Byrne & Co., have agreed to furnish and advance sums of money to the said John Bostwick, and to endorse notes for him, and to accept his bills, &c., not exceeding five thousand dollars, provided that the said Bostwick would obtain the said Stephen Yarborough to consent and agree to become his security, jointly and severally with him, binding themselves to secure and save harmless, the said Reynolds, Byrne & Co., against any balance, that at the end of twelve months may be due to them, to the extent of five thousand dollars." The parties then agree, that if at the expiration of the year, there should be no balance due, or if Bostwick shall pay any such balance or release the plaintiffs from their liabilities, then the obligation to be void; else to remain in full force and virtue.

The plaintiffs allege, that at the expiration of the year, there was a balance due them by Bostwick of five thousand six hundred eighty-six dollars and eighty-five cents, and they pray a judgment *in solido*, either for the penal sum of seven thousand dollars, or the aforesaid balance in the alternative.

Judgment was rendered against Bostwick for the whole balance due, with interest and costs. The parties appear to suppose, that the judgment below was only for five thousand dollars against the security; but on examining the record, it appears that although, after rendering the judgment against both for the whole amount, the judge, before signing it, directed it to be amended, so as to restrain the liability of the security to five thousand dollars; yet probably by a clerical mistake the judgment was ultimately signed, and so appears before this court, against both parties *in solido*, for the whole balance, with interest at ten per cent. and costs.

The plaintiffs appealed from so much of the judgment as relates to the defendant Yarborough, and insist before this

court, that the defendant is bound for the seven thousand dollars, or any less sum, which the plaintiffs had advanced under the agreement.

The appellee answers, that there is no error to the prejudice of the appellant, but he prays that the judgment may be reversed, principally on the ground, that he had not been put legally in delay, before the inception of the suit.

Where parties enter into an obligation containing a penalty of seven thousand dollars, for the faithful payment of a sum not exceeding five thousand dollars at a particular time, on failure of the principal to comply, the surety will only be bound for the principal sum stipulated to be paid, and not the penalty.

The first question, therefore, is, whether the liability of the security was limited to the sum of five thousand dollars by the contract. It seems to us clear, that the plaintiffs did not obligate themselves to advance more than that sum, and that the security did not engage to guarantee the principal for more. Indeed it is formally declared, that he "engages to secure and save harmless the said Reynolds, Byrne & Co., against any balance that at the expiration of the year, may be due to them *to the extent of five thousand dollars.*" But it is contended, that the plaintiffs are entitled to recover the whole seven thousand dollars. This appears to us to be an obligation with a penal clause. The primary obligation of the security was to pay the balance which might be due, not exceeding five thousand dollars, and the penalty was the sum of seven thousand dollars. *La. Code, art.* 2113.

The penal clause in the obligation, is the compensation for the damages the creditor sustains by the *non-execution* of the principal obligation.

"The penal clause is the compensation for the damages which the creditor sustains by the non-execution of the principal obligation." *La. Code, art.* 2121.

But damages due for the *delay* in the performance of an obligation to pay money, are called interest.

"The damages due for delay in the performance of an obligation to pay money, are called interest." *La. Code, art.* 1929.

Conventional interest whether stipulated in *eo nomine* or in the shape of a penalty, cannot exceed *ten per cent.*

It is further provided by the Code, that conventional interest cannot exceed ten per cent. When the parties are silent as to the interest or damages for the non-payment of money, the law fixes it at five per cent. in contracts with individuals, and in those with banks, at the rate established by their charters. But conventional interest, whether stipulated in *eo nomine* or in the shape of a penalty, cannot exceed ten per cent.

This brings us to examine the defence set up by the appellee, that the plaintiffs are not entitled to recover any

thing in this suit, because he had not been put legally in default.

In an action to recover damages for the non-performance of a contract, proof of a putting of the party *in morâ*, by a special demand, was holden by this court, in the case of *Erwin* vs. *Fenwick*, to be a prerequisite to the recovery of any damages. 6 *Martin, N. S.* 229.

In an action to recover damages for the non-performance of a contract, proof of putting the party *in morâ* by a special demand, must be made.

The obligor may be put in default in three different ways: 1st. By the terms of the contract, when it is specially agreed, that the party failing to comply, shall be deemed to be in default, by the mere act of his failure. 2d. By the act of the party; and, 3d. By the operation of law.

Among the acts of the party, by which the obligor may be put in default, is a demand made by the commencement of a suit; that is, as we understand it, a suit to enforce the principal obligation, and not one merely for damages for its non-performance. If then, this suit is instituted to recover the principal sum, to enforce the performance of the primary obligation of the contract, or in lieu thereof to recover the stipulated penalty, the commencement of the suit itself, puts the defendant in default, in relation to damages.

In an action to recover the principal sum, and to enforce the performance of the primary obligation in a contract, the commencement of suit, puts the defendant in default in relation to damages.

According to these principles, if the judgment had been signed as it was directed to be amended, it would have been fully sustained by the law and the evidence; but as this judgment comes before us in such a form, as we think it ought not to stand, it must be reversed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, as relates to the defendant Yarborough, be reversed, and proceeding to render such judgment as ought, in our opinion, to have been given below, it is further adjudged and decreed, that the plaintiffs recover of the said defendant Yarborough, *in solido*, with his co-defendant, the sum of five thousand dollars, with costs of the District Court, and that the costs of the appeal be borne by the appellants.

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DAVID FLOWER *vs.* RACHEL O'CONNER.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

On the death of a partner leaving *several* surviving ones, neither has the right of sueing *alone as surviving partner*, nor has one the right to sue as surviving partner, for the *use of them both*, when there are two surviving.

In all commercial partnerships, the surviving partner, in order to receive the portion of the deceased partner, and hold it subject to the payment of the partnership debts, must make application to the Court of Probates, have such portion ascertained and valued, and give bond with security.

A surviving partner does not possess the right, until he is authorised by the Court of Probates, to sue for, or receive partnership debts.

Pleas or exceptions that are not declinatory, need not be pleaded *in limine litis*.

This suit was instituted by David Flower, *as surviving partner* of the late commercial firm of D. B. Finley & Co., in New-Orleans, to recover from the defendant as the heir of her deceased son, Stephen Bell, the sum of six thousand three hundred and thirty-six dollars eighty-six cents. The suit is brought by D. Flower, *as the surviving partner, &c., for the use of W. & D. Flower*, on a promissory note executed by the firm of Bell & Finley, in favor of D. B. Finley & Co., payable the tenth of March, 1821, for four thousand nine hundred and forty-four dollars eighty-nine cents, and on the balance of an account current in favor of D. B. Finley, and due by said firm of Bell & Finley, for one thousand three hundred eighty-six dollars and ninety-seven cents. The plaintiff alleges that Finley is dead, and his estate is insolvent; and that Bell has since died, and the defendant has accepted his succession with the benefit of inventory, and thereby rendered herself liable to pay the debts thereof. He prays judgment against the defendant for the aggregate sum of six thousand three hundred and thirty-six dollars eighty-six cents, interest and costs.

In an amended and supplemental petition, the plaintiff alleges that the defendant took possession of her son's estate (S. Bell) without the intervention of justice; has never made an inventory thereof, and by her intermeddling in the affairs of said estate, she has become personally liable for the debts thereof.

The defendant pleaded the pendency of another suit, instituted against her by the present plaintiff, for the same subject matter, and upon the same allegations, to which she pleaded in substance, that she had accepted the succession of Stephen Bell, with benefit of inventory, which plea was sustained, and the District Court decided it had not jurisdiction of the case, which judgment, then rendered between the same parties, is now pleaded, as *res judicata*; wherefore she prays to be dismissed.

The defendant further answering and excepting says, she was a married woman when she accepted the succession of her son, that she never interfered with his succession, nor received any portion of it; that she was under this disability, and could not be liable for its administration, or any acts in relation to it, which disability she pleads, &c.

She further denies that the plaintiff is the surviving partner, or was the partner, of the firm of D. B. Finley & Co., or that any such firm existed; or *that the plaintiff is entitled to sue as surviving partner;* but should have caused himself to have been appointed and authorised as the legal representative of said firm as required by law, and not having done so, this suit must be dismissed.

Upon these pleadings, the parties went to trial. The defendant obtained a verdict and a new trial was ordered, and an appeal taken, on which the case was remanded for a new trial. See 8 *Martin, N. S.* 592.

On the return of the case, a second trial was had, which resulted in a verdict and judgment for the plaintiff. The defendant appealed.

Ripley for the plaintiff.

Turner for defendant, assigned errors, as follows:

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1. It is apparent upon the face of the record, that there is a total want of right, in the plaintiff, David Flower, to recover in the form and manner in which he has sued. He sues as *surviving* partner of the firm of D. B. Finley & Co., to the use of himself and another, viz: William Flower; and it appears in the record, that he was not the surviving partner of the firm of D. B. Finley & Co., consequently could not appropriate the debt sued for, to himself, or to any one else.

2. The plea that a surviving partner, could not as such, maintain an action, was a good and sufficient plea, and should have been sustained by the District Court, and it was improperly overruled. *La. Code*, 1131, 1132. 3 *La. Reports*, 357.

3. The motion to amend, by pleading that this suit had been withdrawn, by submitting it to judicial arbitrators, was improperly overruled. *Code of Practice*, 335, 336. *La. Code*, 3066, 3069.

4. This cause was improperly tried, upon the merits, when there was no issue upon the merits, nor judgment by default. 4 *La. Reports*, 13.

5. The verdict and judgment is not sustained by the evidence. There was no proof of the plaintiff's demand.

6. The payments admitted by the plaintiff, if the cause was properly tried upon the merits, should have been imputed, by the jury, to the liquidated demand. *La. Code*, 2162.

Martin, J., delivered the opinion of the court.

In this case the defendant and appellant has assigned as errors on the face of the record, the following:

1. That there was a total incapacity or want of right in the plaintiff to sue in the manner and form in which he has done, because he was not the surviving partner of the firm of D. B. Finley & Co., which was composed of four members, two of whom were living at the institution of the suit.

2. That at the time the suit was instituted, a living partner could not exercise the rights of a deceased one, without

having been authorised to do so by the Court of Probates, and giving bond as required by law.

The counsel for the plaintiff and appellee has replied, that the surviving partners D. & W. Flower, are parties to the present suit, which is brought by D. Flower, for the use of W. & D. Flower. That the want of authority from the Court of Probates, ought to have been presented as exceptions *in limine litis*, which would have afforded to the plaintiffs the opportunity of showing they had obtained such authority, and given bond accordingly.

On the death of a partner leaving *several* surviving ones, neither has the right of sueing *alone as surviving partner*; nor has one the right to sue as surviving partner for the *use of them both*, when there are two surviving.

It is very clear that on the death of one partner, leaving several surviving ones, neither has the right of sueing alone, as surviving partner, and we are not prepared to say that when a suit is brought by A, for the use of B, the latter is necessarily a party to the suit, so as to be concluded by the judgment.

In all commercial partnerships the surviving partner, in order to receive the portion of the deceased partner and hold it subject to the payment of the partnership debts, must make application to the Court of Probates, have such portion ascertained and valued, and give bond with security.

A surviving partner does not possess the right, until he is authorised by the Court of Probates, to sue for or receive partnership debts.

The second error assigned is certainly fatal. The Code in all commercial partnerships, gives to the surviving partner, after the portion of the deceased partner, in the partnership effects, has been ascertained and estimated, the right to require that this portion should remain with his own, in order that the whole may be applied to the discharge of the partnership debts, if necessary. *La. Code, art.* 1131. The next succeeding article requires him to give bond for that purpose. Accordingly this court held in the case of *Crozier* vs. *Hodge*, 3 *La. Reports.* 357, that a surviving partner does not possess the right, until he is authorised by the Court of Probates, to sue for, or receive partnership debts.

There was no necessity of pleading this matter *in limine litis*. This was not a declinatory exception. *Code of Practice, arts.* 335, 336. Indeed the application of the partner, the ascertainment and valuation of the portion of the deceased partner, the requisition of the Court of Probates, and the giving bond, were conditions precedent, without which, the right of mixing this portion with those of the other partners did not vest.

Pleas or exceptions that are not declinatory, need not be pleaded *in limine litis*.

It is clear the District Court erred, in disregarding the plea of the defendant in this respect.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that there be judgment for the defendant as in case of a non-suit, with costs in both courts.

W. & D. FLOWER *vs.* O'CONNER.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where parties agree to submit the matters in controversy between them, in a suit pending, to judicial arbitrators, it by no means follows, that the suit is to be dismissed without the consent of the plaintiff, on the motion or exception of the other party.

A plea of usury is not considered a peremptory exception, going to extinguish the action, and will not be received pending the trial, after the jury is sworn,

The plaintiff may compel the production of accounts or documents, furnished by him, in the course of business, and which are in the hands of the opposite party, although they might not be legal evidence in the cause, when produced, but are open to every legal objection.

The possession of accounts rendered to the defendant, when called for, may be evidence against him, that such accounts were rendered, *i. e.* to prove *rem ipsam*. On refusal to produce them, the plaintiff has a right to give his affidavit in evidence to the jury, describing their contents, and calling for the documents.

When an application is made for the production of documents, in the possession of the opposite party, unaccompanied by affidavit, and duplicates of them are already in court, the order to produce them, will be refused.

The affidavit of the party is insufficient to establish the loss of a note, but it is admissible in evidence, as the basis of other proof, either positive or circumstantial.

In the cross-examination of plaintiff's witness, the defendant cannot require him to detail declarations of the defendant, made out of the presence of the plaintiff, and which make evidence against him.

On cross-examination, plaintiff's witness becomes that of defendant, and the latter cannot make his declarations, made out of the presence of the other party, evidence in his own favor.

An attorney at law, who receives, or is to receive a per centage on the amount of money he recovers, or a stipulated fee, is a competent witness to testify in his client's cause, and is not thereby disqualified, on the score of interest, when that interest consists in his *honorarium*.

Attorneys at law are not inhibited from stipulating for a commission, or per centage on collections to be made by them, and such bargains do not render them incompetent to testify.

An error in calculating the highest rate of interest, by which it exceeds the legal amount one hundred dollars or so, will not be considered as charging usurious interest.

Usury may be shown, and taken advantage of, even when it is not pleaded, if it appears from the petition, or evidence offered by the plaintiff, that more than ten per cent. was stipulated.

The estate of the son, dying without issue, leaving only his mother to inherit, becomes her paraphernal property, and she has a right to administer it, without the interference of her husband.

The acceptance of the succession of her son, by the mother, with the consent of her husband, and the benefit of inventory was an engagement, as relates to creditors, that if she did not administer the estate according to law, as beneficiary heir, she would be personally liable for the debts.

Where a mass of facts, relating to the settlement of a succession and the accounts of a mercantile firm, and where fraud and circumvention is charged, are all submited to a jury, who appear to have carefully allowed the debits and credits between the parties, their verdict will not be disturbed.

This is an action, instituted by W. & D. Flower, against the defendant, as heir at law of her deceased son, Stephen Bell, whose succession it is alleged, she has accepted, with

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benefit of inventory; and to charge her with the balance of a mercantile account against the deceased, amounting to ten thousand six hundred and sixty-eight dollars, which the plaintiffs allege she is liable to pay, and for which they pray judgment, with ten per cent. interest thereon, from the 10th December, 1820, at which time she is charged with having given a written promise to do so.

The defendant pleaded, as *res judicata* to the plaintiffs' demand, the fact of another suit having been instituted against her, by the same plaintiffs, for the same claim, in October, 1826, to which she pleaded in substance, that she was heir under the benefit of inventory, to the said Stephen Bell, which plea was sustained, and the court decided it had no jurisdiction of the case, and that judgment stands as *res judicata* in the present case.

In an amended petition, the plaintiffs charge the defendant with assuming the quality of universal heir, of intermeddling and taking possession of her son's succession, without the authority of justice, by which she became personally liable for his debts, &c.

The defendant replied, that she accepted her son's estate, with benefit of inventory; that at the time of his death, she was a married woman, and never interfered with, or received any portion of his estate; being married, she avers she is not liable for his debts, and expressly pleads her disability, and that she is not responsible, if no inventory was taken thereof.

She then pleads a general denial; admits her signature to the account sued on, but that it is not binding, having been made without the authorisation of her husband.

In a supplemental answer, she reiterates the averment, that her signature to, and approval of the account of plaintiffs', against the succession of her son, is not binding, because she was surprised into it by the plaintiffs, and it was done without the authority and consent of her husband, and without value or consideration; that she acted in relation to her son's estate, for the benefit of the creditors, and applied it to the discharge of his debts, and that the plaintiffs have received

more than their proportion, according to the amount of their claims against it.

A trial was had on this state of the pleadings, and appeal taken from the judgment then rendered, to the Supreme Court. See 8 *Martin, N. S.* 555.

On the return of the case, at May term, 1831, the defendant's counsel moved to dismiss the suit, on the ground, that the parties had mutually submitted the cause to judicial arbitrators; the motion was overruled, and a bill of exceptions taken.

On the final trial, the defendant's counsel moved the court to grant an order on plaintiffs, for the production of the originals of two documents, copies of which were exhibited, marked Y, showing the amount of merchandise, sold by an auctioneer in New-Orleans, by order of plaintiffs, but who had rendered the accounts of sale to Bell; copies of these accounts were annexed to the motion, which was overruled.

The defendant's counsel next moved the court, for leave to file the plea of usury, which was overruled, as the trial had commenced, and the jury were sworn; the opinion of the court was excepted to.

The plaintiffs made an affidavit, of the contents of a certain account current, rendered by them to Bell, in May, 1819, in which they state, they had credited the proceeds of twenty-two bales of cotton to him; and which account they allege, together with several other notes and accounts, specified in the affidavit, are in possession of the defendant's counsel; they obtained an order for their production, in open court, on the next day. On the next morning, the counsel for the defendant moved to rescind this order, on the following grounds:

1. That the documents called for, are not legal evidence in plaintiffs' favor.

2. They are extracts from the books of the plaintiffs, which are not of themselves, legal evidence, consequently extracts from them are less so. 4 *Martin, N. S.* 383.

3. Extracts from merchants' books, are not admissible in evidence. 4 *Martin, N. S.* 483.

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The motion of the counsel was overruled, and the accounts and notes required to be produced. A bill of exceptions was taken. Several other bills of exception were taken, to the decision of the court, on points arising in the progress of the trial. They are all noticed in the opinion of this court.

The parties then went into an examination of the accounts between the plaintiffs and the late Stephen Bell, embracing a variety of commercial transactions and intricate accounts, and after hearing many witnesses on both sides, as to the state of the accounts on both sides, the jury returned a verdict for the plaintiffs of five thousand seven hundred and thirty-six dollars and fifty-three cents.

The defendant's counsel moved the court for a new trial, on the following grounds, viz:

1. The court erred in refusing the plea of usury, by which a large sum of usurious interest was allowed.

2. The court erred, ruling against the defendant, in the several points mentioned in the bills of exception.

3. The verdict is contrary to law and evidence, &c.

The motion was overruled. Judgment was rendered against the defendant, as heir of her deceased son, S. Bell, for the amount found in the verdict, from which she appealed.

Ripley & Haraldson, for the plaintiffs.

Turner, for the defendant.

1. The District Court improperly refused the defendant the privilege, of showing that this case had been, by consent of parties, referred to judicial arbitrators, for decision.

2. The defendant should have been permitted, to avail himself of the plea of usury, at the time when he offered it.

3. The court improperly overruled the motion, to rescind the order in favor of the plaintiffs, for the production of certain accounts and documents, alleged to have been rendered by the plaintiffs to the late Stephen Bell, in his life-time.

4. The court erred, in depriving the defendant of legal proof, by refusing the motion for an order upon the plaintiffs

to produce two documents, being accounts of sales of goods, made at public auction, under the direction of plaintiffs, for account of Stephen Bell.

5. The contract sued on, was executed in error, being an error of fact, in relation to the substance of it; which is therefore illegal and void.

6. The contract is shown to be usurious, and the defendant has a right to take advantage of its illegality, as an error, apparent on the face of the record, in order to have the usury decided on, in this court. 4 *Martin, N. S.* 542.

7. The finding of the jury, is evidently for a much larger sum, than was due, if in fact any thing was due.

8. The plaintiffs should be required to give credit, and be answerable for the amount of the notes and accounts assigned to them, which they have not done.

9. It is apparent on the face of the record, that the judgment is erroneous, in not pursuing the verdict. The jury found interest from the 18th of February, 1825, and the judgment gives interest from the 11th of February, 1825.

10. The instrument sued on, is not binding on the defendant. She was a married woman at the time of its execution, which was done without the authorisation of her husband. It further appears, from the very terms of the act, she did not intend to render herself personally responsible. She is not responsible as heir to her son, not having accepted his succession; nor has she done any act which would make her responsible for the debts of her son.

Bullard, J., delivered the opinion of the court.

The plaintiffs sue to recover of the defendant, the amount of a debt due by one S. Bell, in his life-time, alleging that the defendant is his heir at law, and has rendered herself liable as such unconditionally. It appears by the record, that soon after the death of Bell, the defendant went before the parish judge, and with the consent of her husband, declared that she accepted the succession with the benefit of inventory. Some months after this she signed an account rendered by the defendants against the succession, showing a balance due

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them of about thirteen thousand dollars, approving the same, and authorising its payment with interest at ten per cent.

On a former trial in the District Court, this instrument was regarded as a nullity, it having been signed without the consent of the husband, and the court also refused to receive as evidence the petition of the defendant, authorised by her husband, to be admitted as beneficiary heir of her deceased son. On appeal to this court, it was decided that the court erred in rejecting the evidence, and instructing the jury, that her acknowledgment of the account was void, and that the evidence ought to be admitted, leaving its effect to be judged of by the jury. See 8 *Martin, N. S.* 555.

On the second trial, the jury gave a verdict in favor of the plaintiffs for a large balance, which they found due, with interest, which, after an unsuccessful attempt on the part of the defendant to obtain a new trial, was followed by a judgment of the court; from which the defendant appealed.

The case comes before us on very numerous bills of exception, assignments of error and points filed by counsel, and a full statement of facts.

Where parties agree to submit the matters in controversy between them in a suit pending, to judicial arbitrators, it by no means follows that the suit is to be dismissed without the consent of the plaintiff, on the motion or exception of the other party.

1. The first bill of inception, to which our attention is drawn, was taken to the refusal of the court to dismiss the suit, at the instance of the defendant on her exception, that all matters in controversy, had been submitted to judicial arbitrators, and that the court could no longer take cognizance of the cause. It appears that the court refused to receive the plea, on the ground that it was not a peremptory exception, and that it had previously been decided on motion, at the last term. We are of opinion, that the judge did not err; although parties may agree to submit to arbitrators, matters in controversy in a suit pending, it by no means follows, that the suit is to be dismissed, without the consent of the plaintiff, on the motion or exception of the other party. In this case, it did not appear that such was the agreement.

A plea of usury is not considered a peremptory exception going to extinguish the action, and will not be received pending the trial after the jury is sworn.

2. The next bill of exceptions is to the refusal of the court to allow a plea of usury to be filed pending the trial. It was refused on the ground that it was not a peremptory exception, and that peremptory exceptions mentioned in the Code of

Practice, are such only as go to the extinguishment of the whole action. In our opinion, the court was correct in refusing to receive the plea, after the jury was sworn.

3. During the progress of the trial, the court on an affidavit of the plaintiffs, ordered the production of certain accounts rendered by them to Stephen Bell, in his life-time, and which they alleged, were in the hands of the defendant's attorney. On the following day the attorney moved the court to rescind that order, on the grounds, 1st. That the documents called for, could not make legal proof in favor of the plaintiffs. 2d. That they were extracts from the books of the plaintiffs, and that if the books could not be admitted, much less could extracts be good evidence in their favor; and, 3d. That extracts from merchants' books, are not admissible. The court overruled the motion, on the ground that when the documents were produced, they would then be subject to objections to their admissibility. A bill of exceptions was taken. The contents of the accounts rendered, might not have been evidence in favor of the plaintiffs, but the possession of them by the party, may have been evidence against her, that such accounts were rendered; that is, to prove *rem ipsam*. Whether admissible or not for any purpose, the order was properly given, and the party had always the right to object to their being read to the jury. If inadmissible, it is difficult to conceive what harm their production could have produced, and why they were not produced. On the neglect or refusal to produce the documents, the plaintiffs had a right to give their affidavit in evidence to the jury, as evidence in the cause. We think the court did not err.

The plaintiff may compel the production of accounts or documents, furnished by him in the course of business, and which are in the hands of the opposite party, although they might not be legal evidence in the cause, when produced, but are open to every legal objection.

The possession of accounts rendered to the defendant, when called for may be evidence against him that such accounts were rendered, i.e. to prove *rem ipsam*. On refusal to produce them, the plaintiff has a right to give his affidavit in evidence to the jury, describing their contents, and calling for the documents.

4. In the progress of the trial, the defendant's counsel moved for an order on the plaintiffs to produce the two documents marked Y, annexed to the written motion. This was refused by the court, and the bill of exceptions taken. It is true, the judge did not give the best reason for refusing; his reason was that the transaction between the parties, being a mercantile one, the call should have been for all the books and papers of the plaintiffs, and that the defendant could not single out a particular paper, isolated from the rest. On referring to

When an application is made for the production of documents in the possession of the opposite party, unaccompanied by affidavit, and duplicates of them are already in court, the order to produce them will be refused.

documents Y, we find that they are accounts of auction sales, made for account of W. & D. Flower, rendered by Le Carpentier. As the application was not accompanied by an affidavit, as required by the Code, we are at a loss to know for what purpose the defendant sought the production of papers, of which duplicates were already in court. The refusal of the court to order their production, did not preclude the defendant from offering any evidence, which would tend to show the connexion of those accounts of sales with the present controversy; none is shown by the pleadings, and although we are not prepared to go the whole length with the judge *a quo*, yet, as there were some legal reasons, why the order should not be given, and no possible injury could result to the party from the refusal, we think the judge acted correctly in declining to give the order.

The affidavit of the party is insufficient to establish the loss of a note, but it is admissible in evidence as the basis of other proof, either positive or circumstantial.

5. The next bill of exceptions relied on, was taken to the ruling of the District Court, in admitting the affidavit of one of the plaintiffs, in relation to the loss of a note, which it is stated, was assigned, together with other notes and accounts, to the plaintiffs as collateral security, and which, when paid, were to be credited to the defendant. The reading of the affidavit was objected to on the ground, that the plaintiffs could not make evidence for themselves. According to the article 2258 of the Louisiana Code, the loss of a paper cannot be proved by the affidavit of the party alone. The loss must be shown, either by direct testimony, or by such circumstances *supported by the oath of the party*, as render the loss probable. The oath or affidavit of the party is, therefore, admissible as the basis of other proof, either positive or circumstantial. We think the court correctly admitted it.

In the cross-examination of plaintiff's witness, the defendant cannot require him to detail declarations of the defendant made out of the presence of the plaintiff, and which make evidence against him.

6. In the further progress of the trial, a witness introduced by the plaintiffs, being on his cross-examination, went on to detail certain declarations made by S. Bell in 1819, to him, relative to a draft, which he said he had received, and which would enable him to pay for the goods he had purchased. The plaintiffs' counsel moved the court to strike out all that part of his testimony, given as the declaration of Bell, on the ground that his declarations made out of the presence of the

plaintiffs, ought not to be given in evidence to the jury. The court ordered the evidence to be stricken out, and the defendant took a bill of exceptions. On the cross-examination, the witness became the witness of the defendant, and the defendant being herself the heir of Bell, she could not make his declarations out of the presence of the other party, evidence in her favor, any more than she could her own. We think the evidence was very properly rejected.

On cross-examination, plaintiff's witness becomes that of defendant, and the latter cannot make his declarations made out of the presence of the other party, evidence in his own favor.

7. The last bill of exceptions relied on, was taken by the defendant to the refusal of the court to order the testimony of Mr. Haraldson, of counsel for the plaintiffs, to be stricken out on the ground of interest. On his cross-examination, he stated that "he was so far interested in the suit as to receive a certain per centage on the amount recovered, to wit: five per cent., but since the institution of the suit, he had received an amount of money in compensation and otherwise, which he deemed a sufficient compensation for his services." In addition to this declaration, he tendered a release. The court declined to order the testimony to be stricken out. By article 2262 of the Code, an attorney or counsellor at law, is forbidden, without the consent of his client, to disclose any thing which has been confided to him by such client; but his being employed, does not disqualify him from being a witness in the cause. The same Code gives attorneys and counsellors an action against their clients, to recover their fees. It was not, we think, the intention of the legislature to exclude attorneys at law, on the ground of interest, when that interest consisted in their *honorarium*. It is true they are forbidden to stipulate for a part of the thing in controversy, and in one sense of the word, a per centage is a part of the thing, when that thing is money. But the court is of opinion, that they are not inhibited from stipulating for a certain commission on collections to be made by them, and that such a bargain does not render them incompetent to testify. Independently, therefore, of the release, we consider Mr. Haraldson a competent witness, and that the court did not err, in overruling the motion.

An attorney at law who receives or is to receive, a per centage on the amount of money he recovers, or a stipulated fee, is a competent witness to testify in his client's cause, and is not thereby disqualified, on the score of interest, when that interest consists in his *honorarium*.

Attorneys at law are not inhibited from stipulating for a commission, or per centage on collections to be made by them, and such bargains do not render them incompetent to testify.

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In addition to these bills of exception, the defendant assigns for errors apparent, on the face of the record, 1st. That the contract sued on, is usurious. 2d. That the charge of the court delivered in writing, and contained in the record, is illegal and improper, and 3d. That the judgment differs materially from the verdict rendered.

As to usury, it appears in the record, that the amount found due on settlement, was to bear interest at ten per cent., and it fully appears both by admissions and proof, that in calculating that amount, there was an error of one hundred dollars, which was corrected. This does not appear to us an attempt to obtain a higher rate of interest than the law permits. On the contrary, we should infer the intention of the parties to agree on ten per cent., on whatever amount was really due, as such transactions are always subject to proofs of error.

An error in calculating the highest rate of interest, by which it exceeds the legal amount one hundred dollars or so, will not be considered as charging usurious interest.

The charge of the judge which is complained of, appears to the court fair and impartial. All questions of fact are left exclusively to the jury. They were correctly instructed, that fraud must be proved; that a mere error of calculation of the amount due, without any intention to defraud on the part of the plaintiffs, or their agent, would not be sufficient ground to annul the contract, but reduce the amount. The last sentence is, "usury cannot be proved without being pleaded." This is perhaps too broad a proposition, and not stated with sufficient limitations. Cases may well be imagined, in which it might appear from the petition itself, or the evidence offered by the plaintiffs, that more than ten per cent., was stipulated, and in such a case, even without plea, the court would be bound to notice it, inasmuch as the law refuses an action to enforce such a stipulation. But if the judge only meant that the proofs must correspond with the allegations of the parties, we think him correct. In this case we think the pleadings such, as to have authorised proof of usury, if any had existed. No evidence was offered and rejected, on the ground that usury was not *specially pleaded.*

Usury may be shown, and taken advantage of, even when it is not pleaded, if it appears from the petition, or evidence offered by the plaintiff, that more than ten per cent. was stipulated.

On examination of the judgment, we find it to correspond with the verdict.

Having disposed of these points, we come to the merits. The defendant being the mother of S. Bell, who died without issue, became his heir at law, and was seized of his estate at the moment of his decease, subject however to her right, with the authorisation of her husband, either to renounce it, or to limit her liability to creditors, by accepting with the benefit of inventory. She went before the parish judge, and with the concurrence of her husband, declared her intention to accept the succession with the benefit of inventory. The estate of the son became the paraphernal property of the mother, and she had a right to administer it, without the interference of her husband. The acceptance of the estate with the consent of the husband, was an engagement, as relates to creditors, that if she did not administer the estate according to law, as beneficiary heir, she would be personally liable for the debts; that if she neglected to take an inventory, and other conservatory steps; if by disposing of the property belonging to the estate as her own, she put it out of her own power to make to the creditors, a fair exhibit of the means of the estate to pay its debts, then the creditors should have a right to consider her as having forfeited the benefit of inventory, and made herself unconditional heir. But it is argued, that the husband consented only to an acceptance with benefit of inventory, and she cannot be made heir unconditionally without his consent. To this there are two obvious answers: first, that the husband by assenting to her acceptance with the benefit of inventory, necessarily assented to her administration, as beneficiary heir, and to all the legal consequences of her neglect or mal-administration; and, secondly, that the husband having died in August 1821, it does not appear, that it was then too late for her to liberate herself, by causing an inventory to be made. It was not too late if in the meantime her acts had been merely conservative. These transactions run through a series of years, and this suit was not instituted until April, 1827. It is not pretended that any inventory has ever been made, and some of the property was shown on the trial, to be still in possession of the defendant. It is in evidence also, that she gave up one store of the

The estate of the son, dying without issue, leaving only his mother to inherit, becomes her paraphernal property, and she has a right to administer it, without the interference of her husband.

The acceptance of the succession of her son, by the mother, with the consent of her husband, and the benefit of inventory, was an engagement, as relates to creditors, that if she did not administer the estate according to law, as beneficiary heir, she would be personally liable for the debts.

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Where a mass of facts, relating to the settlement of a succession, and the accounts of a mercantile firm, and where fraud and circumvention is charged, are all submitted to a jury, who appear to have carefully allowed the debits and credits between the parties, their verdict will not be disturbed.

deceased, to her son, who acted as her agent. All the facts were laid before the jury, as well in relation to her management of the succession, as to the credits to which she was entitled, for the notes and accounts turned over to the plaintiffs as collateral security, and other payments made to them both before and after the written acknowledgment of the debt, on the 10th December, 1820; and also in relation to the errors in that settlement, and the alleged fraud and circumvention practiced by the plaintiffs. Those were questions peculiarly of the province of a jury. They seem to have credited her on the amount of principal, and accruing interest due on the 18th of February, 1825, with the sum of about thirteen thousand five hundred dollars. After a careful perusal of the record, we cannot discover that any credit was rejected, to which she was manifestly entitled, and this court cannot disturb the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.